No. 367.

IN THE

Supreme Court of the United States.

No. 367

JOHN W. BLYTHE and
HENRY T. BLYTHE,
APPELLANTS,

vs.

FLORENCE BLYTHE HINCKLEY,
APPELLEE.

16,952

NOTICE OF MOTION

BY FLORENCE BLYTHE HINCKLEY TO DISMISS OR AFFIRM THE APPEAL OF JOHN W. BLYTHE AND HENRY T. BLYTHE.

W. H. H. HART,
Solicitor for Florence Blythe Hinckley.

JOHN GARBER,
ROBERT Y. HAYNE,
FREDERIC D. McKENNEY,
Of Counsel.

IN THE

Supreme Court of the United States.

No. 367.

JOHN W. BLYTHE, and
HENRY T. BLYTHE,
Appellants,
vs.
FLORENCE BLYTHE HINCKLEY,
Appellee.
16,952.

To the appellants John W. Blythe and Henry T. Blythe, Messrs. S. W. & E. B. Holladay, Chandler & Holladay and L. D. McKisick, their solicitors and counsel:

Please take notice that, at the courtroom of the Supreme Court of the United States, in the City of Washington, D. C., on Monday, the 6th day of February, 1899, at the opening of the Court on said day, or as soon thereafter as counsel can be heard, the appellee, Florence Blythe Hinckley, will move the Court to dismiss or affirm the appeal heretofore taken in the above entitled cause by the complainants, John W. Blythe and Henry T.

Blythe, from the final decree in said cause made and entered on December 22d, 1897, dismissing the said complainants' bills, and now on the docket of the Court. Said motion will be made upon the following grounds, viz.:

I.

Said decree of the Circuit Court was plainly right, because the judgments of the State Courts mentioned in the amended and supplemental bills are binding and conclusive upon the federal Courts, and cannot be set aside, overridden or disregarded, and because no federal question is involved in said cause.

II.

No constitutional question is involved in said cause or on said appeal, and that this Court has no jurisdiction of said appeal. III.

The said Circuit Court had no jurisdiction of said cause, because said decrees of said State Courts are valid, and said Circuit Court has no power to set them aside, override or disregard them, and because this Court has, in effect, so decided in the case of Blythe *vs.* Ayres, 167 U. S. 746. and that this Court has no jurisdiction of said appeal. IV.

The said decree of the Circuit Court adjudged that the complainants showed no ground of equity jurisdiction, which adjudication cannot be reviewed by this Court on

certificate, and hence all interest of the appellants has ceased, and it would do no good to reverse any part of said decree.

V.

That it is manifest that the appeal was taken for delay only, and that the supposed questions of jurisdiction are all so frivolous and fictitious as not to need further argument.

The grounds of said motion will more fully appear from the accompanying printed motion and brief, to which reference is hereby made.

Said motion will be made upon the transcript of the record, certified by the Clerk of the Circuit Court, in accordance with the *praecipe* of appellants' solicitors and the order of the Court, and caused to be printed by the appellee and on the files of the Court.

W. H. H. HART,

Solicitor for Florence Blythe Hinckley.

JOHN GARBER,

ROBERT Y. HAYNE,

FREDERIC D. McKENNEY,

Of Counsel.

No. 367.

Br. of Hart, Garber, Hayne & McKenney for Appe

IN THE

Supreme Court of the United States.

OCTOBER TERM 1898.

No. 367

Filed Jan. 16, 1899.

JOHN W. BLYTHE and
HENRY T. BLYTHE,
APPELLANTS,

vs.

FLORENCE BLYTHE HINCKLEY,
APPELLEE.

16,952

MOTION AND BRIEF

ON BEHALF OF FLORENCE BLYTHE HINCKLEY TO DISMISS OR AFFIRM THE APPEAL OF JOHN W. BLYTHE AND HENRY T. BLYTHE.

W. H. H. HART,
Solicitor for Florence Blythe Hinckley.

JOHN GARBER,
ROBERT Y. HAYNE,
FREDERIC D. McKENNEY,
Of Counsel.

IN THE

Supreme Court of the United States

No. 367.—October Term, 1898.

JOHN W. BLYTHE, and
HENRY T. BLYTHE,
Appellants,

vs.

FLORENCE BLYTHE HINCKLEY,
Appellee,

16,952.

MOTION.

And now comes the appellee, Florence Blythe Hinckley, pursuant to her written notice of motion, which was served upon the counsel for the appellants as required by the rule of this Court, and which is filed herewith, and moves to dismiss or affirm the appeal heretofore taken by the complainants, John W. Blythe and Henry T. Blythe, from the final decree made and entered by the Circuit Court of the United States for the Ninth Circuit and Northern District of California, on December 22d, 1897, dismissing the several bills of complaint of said

complainants, which motion is made upon the grounds set forth in the following pages:

[THE REFERENCES ARE TO THE TOP PAGES.]

STATEMENT OF THE CASE.

This is a motion to dismiss or affirm an appeal taken by the complainants, John W. Blythe and Henry T. Blythe, from a final decree dismissing their several bills of complaint.

NATURE OF THE SUIT.

The suit was of the kind usually called, in California, a suit to "quiet title" to real property. It was brought under the following provisions of the Code of Civil Procedure:

Statutory provisions.

Sec. 738. "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." * *

Sec. 380. "In an action brought by a person out of possession of real property to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants; and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendant in the action, against whom the judgment has passed."

Sec. 739. "If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs."

If the defendant be in possession, he is entitled to a jury trial as a matter of right. Construction of the statutory provisions.

Gillespie *vs.* Gouly, 120 Cal., 515.

The suit is different from a suit to remove a cloud.

Castro *vs.* Barry, 79 Cal., 445-7.

It is not necessary that the defendant's claim should have any semblance of validity, or that the complaint should set forth what the defendant's claim is (*Ib.*, 447).

The complaint is very simple in form. It is sufficient for the plaintiff to aver that he is the owner of the interest in question, that the defendant makes some claim adverse to such interest, and that such claim is invalid as against the plaintiff.

Rough *vs.* Simmons, 65 Cal., 227.

Heeser *vs.* Miller, 77 Cal., 193.

Castro *vs.* Barry, 79 Cal., 447.

Riverside Land Co. *vs.* Jensen, 108 Cal., 147.

The defendant must set forth in his answer whatever claims he relies on.

Landregan *vs.* Peppin, 94 Cal., 467.

THE ORIGINAL COMPLAINT.

Original complaint.

This pleading was in the common form above referred to. After stating the citizenship and residence of the respective parties (viz.: that of the complainants, John W. Blythe and Henry T. Blythe, and that of the defendants, Florence Blythe Hinckley, Frederick W. Hinckley, her husband, and The Blythe Company, a corporation), it

alleged that the complainants were the owners as tenants in common of the real property described therein, and that the defendants, "and each of them, claim that they "have or own adversely to plaintiffs some estate, title or "interest in said lands; but plaintiffs allege that said "claims of defendants are false and groundless and with- "out warrant of law, and their claims to said lands are a "cloud upon plaintiffs' title thereto." The prayer was that the defendants should set forth their claims, and that they be adjudged to be groundless, and for an injunction against further pretensions, and for general relief. (Tr., pp. 1-2.)

THE AMENDED COMPLAINT.

Amended complaint.

The amended complaint repeated the allegations of the original complaint, and in addition thereto alleged that The Blythe Company was a corporation, organized under the laws of California; that the defendants were residents within the Northern District of California; that one of the tracts of land described in the original complaint was of the value "of three millions of dollars and upwards," and that at the commencement of the suit neither one of the parties was in possession. (Tr., pp. 2-4.)

Neither of these complaints contained any suggestion of a federal question.

SECOND AMENDED AND SUPPLEMENTAL BILL.

On January 14th, 1897 (which was more than a year

after the commencement of the suit), the complainants, by leave of Court, filed a "second amended and supplemental bill in equity." (Tr., pp. 5-13.) This document stated, in a general way, the previous pleadings, "*and by* "*way of supplement* to the original and amended bills" averred, by way of anticipation, certain matters in relation to the appellee Florence, and sought to overcome the effect of such matters by averring vague conclusions. We shall endeavor to convey an idea of the scope of this pleading by stating in our own way, and in our own order, what we conceive to be its substance.

Second amended and supplemental bill.

It averred that one Thomas H. Blythe was the owner of the property in his lifetime; that he died in the City and County of San Francisco on April 4th, 1883, being at the time of his death a citizen of the United States and of the State of California, *and a resident of said city and county, and leaving an estate therein* [which we may remark in passing gave the San Francisco Probate Court jurisdiction to administer his estate], and that "after the death "of said Thomas H. Blythe, as hereinbefore alleged, the "public administrator of the City and County of San "Francisco took charge of the estate of said Blythe and "entered upon the administration of the same." [N. B.—This could not have been legally done except upon taking out regular letters of administration from the Probate Court, upon petition and after the usual statutory notice, the same as in the case of all other administrations.] The

Administration on estate of Thomas H. Blythe.

Alleged incapacity of the appellee.

bill further averred certain facts which the pleader evidently supposed went to show that the appellee Florence was incapable of inheriting from said Thomas H. Blythe. In this regard the bill averred that the appellee Florence was born in England, "the bastard child of an unmarried "woman"; that the mother was a British subject; that Florence remained in England until after the death of Thomas H. Blythe, but that after his death, viz.: in 1883, she came to California, being then an infant ten years old and "ineligible to become a citizen of the United States," and that she "was when she arrived in California a non-"resident alien." The bill then proceeds to make averments as to the law of California; and as these averments are the only indication which we see of an attempt to invoke a Federal right, we give them in the pleader's language, to wit:

Attempt to state a federal question.

"That the laws in force in the State of California "in the year 1883, when the said Thomas H. Blythe "died, relating to the rights of foreigners and aliens "to take real estate by succession as heirs at law of "a deceased citizen of the State of California *were the* "*treaty of 1794*, between his Britannic Majesty and "the United States, *and the naturalization laws of the* "*United States* and Section 17 of Article I of the Con-"stitution of California, adopted in the ——— 1879, "which said Section 17 of Article I was made manda-"tory and prohibitory by Section 22 of Article I of "said Constitution. When said Constitution was "adopted, and long prior thereto, there were in the "Civil Code of California certain sections, namely, "Sections 671, 672 and 1404, relating to said subject,

"which last named sections were and are contrary "to and inconsistent with and in violation of said "Section 17 of Article I of said Constitution, and "were by the provisions of said Section 17 and Sec- "tion 22 of Article I annulled and abrogated." (Tr., p. 8.)

Alleged violation of State Constitution and laws.

The bill then referred to certain other provisions of the Civil Code, viz., Sections 230 and 1387, in relation to adoption and the institution of heirship of illegitimate children, and, with reference to the latter, averred that it had been often construed by the Supreme Court of the State, and that such construction had become a rule of property since the year 1854 "until it was attempted to "be changed and abrogated by a decision of said Su- "preme Court made in the year 1894." [Mem.: These several provisions of the Civil Code, and of the Constitution, are given in the note below.]

Provisions referred to in the bill.

Note. Sec. 671. "Any person, *whether citizen or alien*, may take, "hold and dispose of property real of personal within this State."

Sec. 672. "If a non-resident alien takes by succession, he must ap- "pear and claim the property within five years from the time of suc- "cession, or be barred. The property in such case is disposed of as "provided in Title VIII, Part III, Code of Civil Procedure" [relating to escheat proceedings].

Sec. 1404. "Resident aliens may take in all cases by succession as "citizens; and no person capable of succeeding under the provisions of "this title is precluded from such succession by reason of the alienage "of any relative; but no non-resident foreigner can take by succession, "unless he appears and claims such succession within five years after "the death of the decedent to whom he claims succession."

Sec. 17 of Art. 1 (of Constitution). "Foreigners of the white race or "of African descent, eligible to become citizens of the United States un- "der the naturalization laws thereof, while bona fide residents of this "State shall have the same rights in respect to the acquisition, posses- "sion, enjoyment, transmission and inheritance of property as native "born citizens."

Sec. 22 of Art. 1 (of Constitution). "The provisions of this constitu- "tion are mandatory and prohibitory unless by express words they are "declared to be otherwise."

Sec. 230 (of Civil Code). "The father of an illegitimate child, by "publicly acknowledging it as his own, receiving it as such, with the

It was further averred that there was no law in England under which said Thomas H. Blythe could have legitimated the appellee or made her his heir or changed her allegiance or her residence without bringing her to California.

The bill then proceeded to anticipate and attack the muniments of the appellee's title, viz., three decrees of the Superior Court of San Francisco sitting in probate, and to cast epithets at them. As these decrees are important, we proceed to give the averments concerning them separately.

The proceeding to determine heirship.

(1) The first was a decree made upon a direct proceeding in said Superior Court to determine the question of the heirship. In that regard the bill avers—

> "that after the said Florence first came to San Fran-
> "cisco one James Crisp Perry, who was then and
> "there a subject of the Queen of Great Britain, was

"consent of his wife, if he is married, into his family, and otherwise "treating it as if it were a legitimate child, thereby adopts it as such; "and such child is thereupon deemed for all purposes legitimate from "the time of its birth. The foregoing provisions of this chapter do not "apply to such an adoption."

Sec. 1387. "Every illegitimate child is an heir of the person who, in "writing, signed in the presence of a competent witness, acknowledges "himself to be the father of such child; and in all cases is an heir of his "mother; and inherits his or her estate, in whole or in part, as the case "may be, in the same manner as if he had been born in lawful wed-"lock; but he does not represent his father or mother by inheriting "any part of the estate of his or her kindred, either lineal or collateral, "unless before his death, his parents shall have intermarried, and his "father, after such marriage, acknowledges him as his child, or adopts "him into his family; in which case such child and all the legitimate "children are considered brothers and sisters, and on the death of "either of them, intestate, and without issue, the others inherit his es-"tate, and are heirs, as hereinbefore provided, in like manner as if all "the children had been legitimate; saving to the father and mother "respectively their rights in the estates of all of the children in like "manner as if all had been legitimate. The issue of all marriages null "in law are legitimate."

Appellee's pleading in the proceeding to determine heirship.

"appointed by said Superior Court of the City and "County of San Francisco guardian of said Florence, "and thereafter, as such guardian, *he commenced a* "*proceeding* in said Superior Court in the name of "said Florence *to have the Court ascertain, adjudge and* "*determine* the heirship to the said Thomas H. Blythe "and the ownership of his estate, and, in substance, "*that she, said Florence, was the daughter and the sole* "*heir of said Thomas H. Blythe* under and by virtue of "said Sections 230 and 1387 of said Civil Code, or "under and by virtue of one or the other of said sec-"tions, and also by virtue thereof *to have the said* "*Court adjudge and decree that the said Florence was* "*the sole heir at law of the said Thomas H. Blythe and* "*entitled to inherit his estate.*" [Tr., p. 9. Substantially the same averment is in the third amended and supplemental bill. See Tr., p. 31.]

Appellants joinder of issue thereon.

It will thus be seen that the matter of the appellee's right to the property which the complainants seek to litigate here was distinctly pleaded by her in her application to the Superior Court. The bill then proceeds to show that the appellants appeared and joined issue upon the said pleading of the appellee. In this regard the bill alleges—

"that your orators appeared in said action or pro-"ceedings, and filed their answer therein, *denying and* "*contesting the right and title of said Florence and claim-*"*ing for themselves to be heirs of said Blythe.*" [Tr., p. 9. Substantially the same averment is in the third amended and supplemental bill. See Tr., p. 31.]

The bill then proceeds to show that the question of the alleged disability of said Florence by reason of the cir-

cumstances of her birth and of her alienage was actually litigated in said proceeding. In this regard it avers—

The question actually litigated.

> "that thereafter such proceedings were had in said "Court in the said cause that it was for the first time "*made to appear plainly to the Court* upon the record "that said Florence was an illegitimate child; that "she was born in England, and that neither she nor "her alleged mother, nor father of the alleged "mother, had ever been within the United States or "eligible to become citizens thereof until after the "death of the said Thomas H. Blythe." * * * "* * * Your orators further say that in the said "proceeding, wherein the said Florence was peti- "tioner and plaintiff, *it was at the trial thereof at- "tempted to be proven* by her and in her behalf that the "said Thomas H. Blythe, after the birth of the said "Florence, and before his death, and while he was "living in the State of Califronia, and while the said "Florence was living in England, as aforesaid, at- "tempted to legitimate the said Florence by adop- "tion under said Section 230 of the Civil Code, *or to "institute her as his heir* under said Section 1387 of "said Code." [Tr., p. 9. Substantially the same averment is made in the third amended and supplemental bill. See Tr., pp. 31-2.]

The bill then proceeds to show that the Superior Court decreed in favor of the appellee Florence. In that regard it states that—

The decree in favor of the appellee.

> "the said Superior Court * * * *decided in sub- "stance and effect that said Thomas H. Blythe had in his "lifetime adopted and legitimated the said Florence.*" [Tr., p. 9. Substantially the same averment is made in the third amended and supplemental bill. See Tr., p. 32.]

The proceedings on appeal are then stated as follows:

The affirmance by the Supreme Court.

> " that from said judgment your orators appealed to
> " the State Supreme Court, and in that Court the
> " case was argued, and by a divided Court it was
> " * * in substance and effect, decided that the said
> " Thomas H. Blythe had not adopted or legitimated
> " the said Florence under or in conformity with said
> " Section 230 of the Civil Code, *but that he had consti-*
> " *tuted her his heir* under and pursuant to the pro-
> " visions of Section 1387 of said Civil Code." [Tr., p. 10. Substantially the same averment is made in the third amended and supplemental bill. Tr., p. 32.]

This bill shows, therefore, not only that the claim of the said Florence was set forth in her pleading in the Superior Court, but was put in issue by the appellants, and actually litigated, and was by said Court adjudged in her favor upon two distinct grounds; that an appeal was taken to the Supreme Court, and that the decree was affirmed on one of the grounds, which, however, was amply sufficient to sustain the decree.

We have thus far omitted the attacks made by the bill, upon the decree in order to collect them all in one place. They are as follows:

In reference to the trial the bill states that when it was made to appear that the appellee was a non-resident alien and had never been a resident of California until after the death of said Thomas H. Blythe—

> " it was the duty of said Court to dismiss the petition
> "or complaint, or both, of the said Florence, in so far

Attempted impeachment of the decree.

"as the title and descent of the above described real "estate was involved or affected, *for want of jurisdic-* "*tion* in said Court to adjudge or decree that said "Florence was capable of inheriting said real estate "as an heir at law of said Thomas H. Blythe." [Tr., p. 9. Substantially the same statement is made in the third amended and supplemental bill. Tr., p. 31.]

In stating the decision of the Superior Court the bill says that that Court decided the case in favor of the appellee "without jurisdiction so to do" (*ib.*). And in similar phrase it says that the Supreme Court affirmed the judgment "without any jurisdiction so to do." [Tr., p. 10. Substantially the same statements were made in the third amended and supplemental bill. See Tr., p. 32.]

The bill further animadverts upon the decisions as follows:

"And in that behalf your orators say that neither "the said Superior Court nor the said Supreme Court "considered, adjudged or construed, in making its "decision, the said Section 17 of Article I and said "Section 22 of Article I of the Constitution of the "State of California; nor were the rights of your "orators under those sections adjudged or deter- "mined by either of said Courts or by its decision.

"And in that behalf your orators say that said last "decision so made by a divided Court was and is con- "trary to and in violation of *the Constitution of the* "*State of California*, and was and is contrary to and "direct conflict with *numerous former decisions of said* "*Supreme Court*, which former decisions had long be- "fore established a rule of property in said State, "which rule had excluded aliens and foreigners who

"occupied the same or similar status as did said "Florence, from inheriting real estate in the State of "California. Attempted impeachment of the decree.

"And in that behalf your orators further say that "they are informed and believe, and upon their in- "fomation and belief say, that they are not precluded "in the said conflicting decisions of the State Court, "nor by anything contained in the record of the pro- "ceedings upon which said last decision was made, "from prosecuting this their action in this Court, nor "is this Court precluded from entertaining jurisdic- "tion of this action and deciding it upon its merits, "nor is said last decision binding or obligatory as "authority or otherwise upon this Court." [Tr., p. 10. Substantially similar averments are made in the third amended and supplemental bill. Tr., p. 32.]

That is all that the bill has to say in derogation of the decree upon the proceeding to determine the heirship of the several persons laying claim to the estate of Thomas H. Blythe.

(2.) The next muniment of the appellee's title is the decree of partial distribution. The allegations as to the proceeding and the incantations against it are similar to those in relation to the first decree, and we shall give them as they stand. They are as follows: Proceedings on partial distribution.

"And your orators further say that heretofore, "to wit, on June 18, 1894, said Florence, calling her- "self Florence Blythe, filed in said Superior Court, "in the matter of the estate of said Thomas H. Blythe, "deceased, *her petition for distribution*, praying for an

Petition for partial distribution.

"order of said Court distributing to her the share of "said estate to which she claimed to be entitled, "to wit, the whole of said estate, embracing the real "property first above described, *to which she alleged* "*herself to be entitled only as sole heir at law and sole* "*next of kin to said Thomas H. Blythe, deceased.*

"That in her said petition *it was plainly made to* "*appear* to said Court that said Florence, the peti- "tioner, was a non-resident alien, and was not and "never had been a bona fide resident of the State of "California until after the death of said Thomas H. "Blythe and descent cast, and your orators say that "it was the duty of said Court to dismiss the said "petition for distribution of said Florence, in so far "as the title and descent of the above described real "estate was involved or affected, for want of juris- "diction in said Court to adjudge or decree that said "Florence was capable of inheriting said real estate "as heir at law of said Thomas H. Blythe, or to dis- "tribute said real estate to her.

Joinder of issue thereon.

"*That your orators answered said petition* for distri- "bution, *and thereby took issue upon all the material* "*averments thereof*, and therein claimed said estate as "heirs of said Blythe.

"That afterwards the Court, sitting in probate, "without right or jurisdiction so to do, *heard said* "*petition for distribution*, and afterwards, on October "26, 1894, said Court *went through the idle form of* "*granting a decree of distribution*, and on that day a "document *which falsely purported to be a decree of dis-* "*tribution* of *nearly* all the property of said estate of "Thomas H. Blythe *to said Florence*, embracing all of "the real property above described, *was signed by the* "*Judge of said Court and filed by the Clerk*, and on the "next day thereof *was recorded* in the minute book of "said Court. [N. B.—No other entry of such de- "crees is required. Re Blythe, 110 Cal., 226.]

Decree of partial distribution.

"And your orators say that said pretended decree "of distribution was and is null and void for want of "jurisdiction in said Court to make the same." [Tr., pp. 10-11. Substantially similar averments are made in the third amended and supplemental bill. Tr., pp. 32-3.]

Decree of final distribution.

The bill then states that the appellee attained her majority on or about December 18th, 1891, and that on September 21st, 1892, she married the defendant Frederick W. Hinckley.

(3). The third muniment of the appellee's title is the decree of final distribution. The averments in relation to that are as follows:

"And your orators further say that heretofore and "since the filing of the original bill herein, to wit, on "January 2d, 1896, said Florence, calling herself "Florence Blythe Hinckley, *filed in said Superior "Court*, in the matter of the estate of said Thomas H. "Blythe, deceased, *her petition for final distribution to "her* of said estate, wherein and whereby she prayed "for an order of said Court distributing to her the "residue of said estate then remaining in the hands "of the public administrator, amounting to the sum "of $89,842.94, the same and the whole thereof being "the rents accrued from the real property aforesaid, "to which she alleged herself to be entitled only as "the sole heir at law and sole next of kin to said "Thomas H. Blythe, deceased.

The possession of the appellee.

Prayer of the bill

"That in her said petition *it was made "plainly to appear* to said Court that said "Florence, the petitioner, was born and con-"tinued to be a non-resident alien until after

and your orators say that it was the duty of said Court to dismiss said pet.

"the death of said Blythe, and was not and "never had been a bona fide resident of the State of "California until after the death of said Thomas H. "Blythe and descent cast; and your orators say that "tion for final distribution to said Florence, in so far "as the above described real estate and said rents "were involved or affected, *for want of jurisdiction* in "said Court to adjudge or decree that said Florence "was incapable of inheriting said real estate as heir "at law of said Thomas H. Blythe, deceased, or to "distribute said estate to her.

"*That notice of said petition was given to your orators,* "who were notified and invited to come into Court "and show why said petition should not be granted.

Joinder of issue thereon.

"That in obedience and response to said notice "*your orators did, on January 16th, 1896, file in said* "*Court their answer, wherein and whereby they denied* "*the right of said Florence to have said rents distributed* "*to her and claimed that they were the next of kin of said* "*Thomas H. Blythe, deceased,* and entitled to said "rents.

The hearing.

"That afterwards, on the 16th day of January, "1896, said Court, sitting in probate, without right "or jurisdiction so to do, *heard said petition for final* "*distribution* and wrongfully struck from the files the "answer and opposition so theretofore filed by your "orators, and when your orators arose and attempt-"ed to object and to show cause why said petition "should not be granted, said Court refused to permit "your orators to be in anywise heard. [Mem.: It is to be observed that the Court "heard said petition," and that it is not stated what the petition contained; presumably it set forth the previous decrees of the Court; and if so, and the appellants' answer did not deny the prior adjudications, but admitted them, and merely denied in general terms the right of the appellee, it is no wonder that the Court refused to

give such an answer any serious consideration. Re Blythe, 112 Cal., 694; Re Blythe, 115 Cal., 553.]

"And afterwards, on January 18th, 1896, said Court "*went through the idle form* of granting a decree of "final distribution, and on that day a document "which falsely purported to be a decree of final dis- "tribution, distributing to said Florence all the resi- "due of said estate, based upon said petition last "aforesaid, *was signed by the Judge of said Court and* "*filed by the Clerk, and the same was thereafter recorded* "*in the minute book of said Court.* [Mem.: No other recording or entry is provided for decrees of this character. Re Blythe, 110 Cal., 226.]

"And your orators say that said pretended decree "of final distribution was and is null and void for "want of jurisdiction in said Court to make the "same." [Tr., pp. 11-12. Substantially similar averments are made in the third amended and supplemental bill. Tr., pp. 34-5.]

The bill goes on to state that at the commencement of the suit the public administrator was in possession of the property, but that subsequent thereto the appellee obtained possession under the decrees of distribution above referred to, and still is in such possession. It then goes on to show a basis for an accounting as to the rents and profits, and prays for a decree quieting complainants' title, and for an accounting as to the rents and profits, and for general relief, and for a receiver *pendente lite*. [Tr., pp. 12-13. Substantially similar averments are made in the third amended and supplemental bill. Tr., pp. 35-6.]

Boswell M. Blythe.

This bill brought in one Boswell M. Blythe as a defendant, upon the allegation that he was one of the heirs of Thomas H. Blythe, but "that *by reason of his citizenship* he "cannot join your orators as complainants," and that as he resided out of the jurisdiction complainants stated the facts concerning him. [Mem.: See Blacklock *vs.* Small, 127 U. S., 96.] The suit was subsequently dismissed as to this party. (Tr., pp. 15-16.)

No fraud charged.

It will be observed that none of these bills makes the least charge of fraud in the obtaining of either of the three decrees of the Superior Court above mentioned. Nor is any concealment, suppression or want of information charged. On the contrary, it is expressly stated that the illegitimacy, alienage and non-residence of the appellee here at the time of descent cast were "made plainly "to appear" to the Court.

DISMISSAL OF THE SUIT.

Proceedings on the motion to dismiss.

After the filing of the Second Amended and Supplemental Bill, the appellee Florence moved to dismiss the suit for want of jurisdiction. (Tr., p. 14.) This motion was granted, the opinion thereon being set forth in the record. (Tr., pp. 17-28.) The appellants, however, obtained leave to amend their bill. In this regard the certificate states that after the Court ordered the dismissal, it—

"gave the complainants leave to amend their bill Proceedings on motion to dismiss.
"*upon the understanding that it would not necessitate any*
"*further argument, but should be subject to the prior mo-*
"*tion to dismiss the second amended and supplemental*
"*bill and to the order for a final decree entered thereon;*
"that thereafter in due season, on the 22nd day of
"December, 1897, the complainants, pursuant to the
"leave given them by said Circuit Court, filed their
"third amended and supplemental bill against said
"defendant Florence Blythe Hinckley, and there-
"upon an in due season, the said defendant, by her
"solicitor, appeared to said last bill and moved the
"Court to dismiss the suit upon the same grounds
"and for the same reasons stated and contained in
"the motion hereinbefore set out to dismiss the sec-
"ond amended and supplemental bill.

"It was thereupon stipulated and agreed in open
"Court by and between the solicitors for complain-
"ants and said defendant Florence Blythe Hinck-
"ley, with the consent of the Court, that said
"last named motion should be and the same then and
"there was submitted to the Court for its decision
"upon the facts, matters and things stated and al-
"leged in said third amended and supplemental bill
"of complaint, and upon the said motion of said de-
"fendant, Florence Blythe Hinckley, and upon the
"arguments of solicitors and counsel for the re-
"spective parties made by them on the hearing of
"the motion to dismiss the suit and cause of action
"in said second amended and supplemental bill
"stated and alleged." (Tr., p. 49.)

This bill also was dismissed, as will appear from the final decree hereinafter referred to.

THIRD AMENDED AND SUPPLEMENTAL BILL.

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The complainants' third amended and supplemental bill, filed under the circumstances mentioned in the preceding extract, viz., "upon the understanding that it "would not necessitate any further argument, but should "be subject to the prior motion to dismiss the second "amended and supplemental bill, and to the order for a "final decree entered thereon," was the same in substance as its predecessor, except in the following particulars, viz.: It set forth certain reasons to show why an action at law would not be an adequate remedy (See Tr., pp. 37-8); it expressly admitted and averred *that if the appellee Florence could take by descent from Thomas H. Blythe, then she had the true title and the complainants had no case* (Tr., p. 37); and it amplified the invocation of a federal question. Its averments in this latter regard are as follows:

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"And your orators further say that said Court, with- "out any jurisdiction so to do, decided in substance "and effect, that said Thomas H. Blythe had in his "lifetime adopted and legitimated the said Florence "by holding and deciding that Sections 230 and 1387 "of the Civil Code of California operated upon said "Florence while an alien and residing in England, "and gave power to said Blythe to adopt her and "make her his heir while said Florence was in Eng- "land and said Blythe was in California, which said "statute did not do; and in that behalf your orators "say that in making said decision the Court *did not* "*take into consideration Section 1978 of the Revised*

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" *Statutes of the United States*, nor were the rights " of your orators or of said Florence under that sec- ' tion, or at all, adjudged or determined." (Tr., p. 32.)

" * * * And your orators say that said pre- " tended decree of distribution was and is null and " void for the want of jurisdiction in said Court to " make the same, for the following reasons, among " others: Section 671 of the Civil Code of California, " reading as follows, 'Every person, whether citizen " 'or alien, may take, hold, and dispose of property, " 'real or personal, within this State,' *was and is void* " *as to aliens*, and Section 672 of said Civil Code, " which reads as follows, 'If a non-resident alien take " 'by succession, he must appear and claim the prop- " 'erty within five years from the time of succession, " 'or be barred,' under which alone she claims title, " *is also void as to aliens*, and especially as to said " Florence.

" Your orators allege that *said sections and each of* " *them is an encroachment upon and an erasion and viola-* " *tion of and a substitution for the treaty making power of* " *the United States*, and, if enforced, *operate as treaty* " *provisions between the State of California and all* " *foreign governments*, and were and each of them is " void and in conflict with and forbidden *by Section* " *10, Article I, of the Constitution of the United* " *States*, and with the treaty making power thereof, " and in violation of and in conflict with Section 1978 " of the Revised Statutes of the United States, and " both of them are and each of them is in excess of " the jurisdiction of the State of California to enact, " and of the Courts of California to enforce; that said " judgment or decree awarding said real property to " said Florence on her petition alone, as was done, " has no other legal support or justification than said " sections of the Code of California, which are void, " *so far as they apply to aliens*, and particularly to said

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" Florence, for the reasons that they violate the Con-
" stitution and laws and treaties of the United
" States, and because California and her Courts *have*
" *no jurisdiction to enact or enforce said statutes, or either*
" *of them, as to aliens,* and said statutes violate and
" each of them violates and is forbidden by the Con-
" stitution of the United States, the treaty making
" power and existing treaties of the United States,
" and said judgment or decree in execution of said
" statutes is void. Your orators allege that none of
" the constitutional or other objections aforesaid to
" the jurisdiction of said Court or the validity of said
" statutes, as applicable to said Florence, were de-
" cided or considered by the Court upon the hearing
" of said petition for distribution; that the judgment
" of said Superior Court awarding said property to
" said Florence was further without jurisdiction, for
" said Court held, adjudged and decreed that said
" Blythe's alleged action under Section 1387 of the
" Civil Code of California, reading as follows, 'Every
" 'illegitimate child is an heir of the person who in
" writing, signed in the presence of a competent wit-
" 'ness, acknowledges himself to be the father of such
" 'child,' operates and did operate upon said Florence
" in England and outside of and beyond the geograph-
" ical jurisdiction and the boundaries of the State
" of California, and said Court adjudged and held
" that said statute and said action *operated to change*
" *and fix the social, political and legal status of said*
" *Florence while an illegitimate alien,* as she then and
" there was residing in England at the time of de-
" scent cast and always prior thereto.

" Your orators say that Section 1387 does not in
" terms operate beyond the geographical boundaries
" of the State of California, and it had no
" operation or effect at any time in the
" Kingdom of Great Britain, nor did any al-

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"leged action under it; and it had no opera-
'tion upon said Florence or her right to said real
"property at the time of descent cast or prior thereto,
"nor did said judgment so operate; that said sec-
"tion (Sec. 1387), as construed by the Court, was and
"is *against Article 1, Section X, of the Federal Constitu-*
"*tion and an invasion of the jurisdiction of international*
"*intercourse between the United States Government and*
"*the Government of England,* which jurisdiction is ex-
"clusively with the United States, and was and is un-
"constitutional and void because thereof, and be-
"cause of a lack of power and jurisdiction in Cali-
"fornia or its Courts to give said statute the opera-
"tion which it was adjudged by said Court to have,
"and invades the treaty making power of the United
"States, and said section is in violation of Section
"1978 of the Revised Statutes of the United States
"and of the rights of complainant (pp. 33-4). * * *
* * * "And your orators say that Sections 671,
"672, and 1387 of the Civil Code of California,
"through which and not otherwise, said Florence
"claims title to said real property and said rents, are
"and each of them is *in conflict with existing treaties*
"between the United States of America *and Russia*
"*and Switzerland and France* and England, and
"against the Constitution of the United States in the
"particulars hereinbefore mentioned, as well as the
"fourteenth amendment thereto, which limits the
"jurisdiction of the State to its own citizens.

"The complainants claim that they had the right,
"as citizens of the United States, to inherit the real
"property here involved under the laws of California
"and under Article IV, Section 2, of the Constituti-
"tion of the United States, and under Section 1978
"of the Revised Statutes of the United States, and
"that said Florence has and had no right thereto,

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" because at the time of the death of Thomas H.
" Blythe and descent cast she was an illegitimate
" alien and a British subject and was and always had
" been in England, and that in determining the ques-
" tions of the rights of the parties herein the con-
" struction and application of the Constitution of the
" United States are involved, and therefore your ora-
" tors allege and claim that this Court has jurisdic-
" tion thereof, on the ground that the construction
" and application of the Federal Constitution are in-
" volved, as well as on the ground of diverse citizen-
" ship of the parties, and because said sections of said
" Civil Code violate the Federal Constitution, as
" herein stated."

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The appellants asked to be allowed to file a further amendment, contradicting what was manifestly the effect of the decrees stated in the second and third amended and supplemental bills. The Circuit Court refused to allow such amendment to be made, and the complainants thereupon obtained a "bill of exceptions" to such refusal. (Tr., p. 39.)

We do not understand that the bill superseded the prior bills.

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1 Danl. Ch. Pr. (Perkins' Ed.), p. 402-3.

French *vs.* Hay, 22 Wall., 246.

Keyser *vs.* Renner, 87 Va., 251.

Excelsior Co. *vs.* Brown, 74 Fed., 323-4.

Walsh *vs.* Smyth, 3 Bland Ch., 20.

Catton *vs.* Carlisle, 5 Mass., 427.

Jopling *vs.* Stuart, 4 Ves., 619.

Bacon *vs.* Griffith, 4 Ves., 619-20.
Winter *vs.* Quarles, 43 Ala., 695.
Carey *vs.* Smith, 11 Ga., 547.
Wilson *vs.* Beadle, 2 Head, 512.
Bradley *vs.* Dibble, 3 Heisk., 524.
Taunton *vs.* McInnish, 46 Ala., 622.
Mezeix *vs.* McGraw, 44 Miss., 111.
Hammond *vs.* Place, Harr (Mich.), 438.

But there is little difference between the last two bills.

THE FINAL DECREE.

Grounds of dismissal.

The final decree, entered December 22d, 1897, finally dismissed the various bills of complainants "for want *of* "*either Federal or equity* jurisdiction." (Tr., pp. 40-1.)

THE APPEAL AND CERTIFICATE.

Petition for appeal.

The complainants' petition for an order allowing an peal stated as the proposed grounds of appeal the alleged error of the Court "in holding and deciding, as it did do, "that it had no jurisdiction of complainants' suit on any "ground set up by complainants, and that no federal "question was involved therein," and because—

"the construction and application of the Constitu-
"tion of the United States was involved in the mat-

"ters, allegations and averments of complainants, "though this Court erred in deciding otherwise, and "that they were not involved; and your petitioners "state that they are entitled to an appeal on the fur- "ther ground that this Court erred in deciding on "said motion, as it did, that Sections 671, 672, and "Sections 230 and 1387 of the Civil Code of Califor- "nia, in their construction and application to this "suit, did not contravene the Constitution of the "United States, as stated in the assignment of errors "filed herewith." (Tr., pp. 41-2.)

Assignments of error.

The complainants filed twenty-three assignments of error, for which we beg leave to refer to the record. (Tr., fols. 43-6.)

Order allowing appeal.

The order allowing the appeal was general. (Tr., pp. 46-7.) Although the opinion of the Circuit Court (See Tr., pp. 17-28) shows only two grounds upon which the suit was dismissed, the appellants have so phrased the certificate as to state fifteen grounds (Tr., pp. 50-3), some of which were of considerable length.

The foregoing is probably a sufficient statement of the case. But it will perhaps be of assistance to the Court, in the examination of the motions, if we give, as part of the statement of the case, the statutory and constitutional provisions, which may require its attention, together with the settled construction thereof, avoiding as much as possible controverted questions. This we now proceed to do.

JURISDICTION OF THE SUPERIOR COURT.

The State Constitution provides (with certain exceptions not material here), that "there shall be in each of "the organized counties of the State a Superior Court, "for each of which at least one Judge shall be elected." (Art. VI, Sec. 6.) It expressly provides that such Courts "shall be Courts of Record," (Art. VI, Sec. 12), and defines their jurisdiction as follows:

The State Constitution.

Sec. 5 (Art. VI). "The Superior Court shall have "original jurisdiction *in all cases in equity*, and *in all* "*cases at law which involve* the title or possession of "real property, or the legality of any tax, impost, "assessment, toll, or municipal fine, and in all other "cases in which the demand, exclusive of interest or "the value of the property in controversy, amounts "to three hundred dollars, and *in all criminal cases* "amounting to felony, and cases of misdemeanor not "otherwise provided for; of actions of forcible entry "and detainer; of proceedings in insolvency; of "actions to prevent or abate a nuisance; *of all matters* "*of probate;* of divorce and for annulment of mar- "riage, and of all such special cases and proceedings "as are not otherwise provided for. And said Court "shall have the power of naturalization, and to issue "papers therefor. They shall have appellate juris- "diction in such cases arising in Justices' and other "inferior Court in their respective counties as may "be prescribed by law. They shall be always open "(legal holidays and non-judicial days excepted), "and their process shall extend to all parts of the "State; *provided*, that all actions for the recovery of "the possession of, quieting the title to, or for the en- "forcement of liens upon real estate, shall be com-

"menced in the county in which the real estate, or "any part thereof affected by such action or actions "is situated. Said Courts, and their Judges, shall "have power to issue writs of mandamus, certiorari, "prohibition, quo warranto, and habeas corpus, on "petition by or on behalf of any person in actual "custody in their respective counties. Injunctions "and writs of prohibition may be issued and served "on legal holidays and non-judicial days."

Superior Court sitting in probate is a Court of general jurisdiction.

Under these provisions, it is settled (contrary to the view which was at first taken) that the Court, sitting in probate, is a Court of general jurisdiction, with ample equity powers in probate matters.

Heydenfeldt *vs.* Superior Court, 117 Cal., 348.

Ions *vs.* Harbison, 112 Cal., 268.

Burris *vs.* Kennedy, 108 Cal., 331.

Estate of Moore, 96 Cal., 528.

In re Burton, 93 Cal., 459.

The same was true (since 1858) of the Probate Courts prior to the Constitution, although the latter were of more limited powers.

Robinson *vs.* Fair, 128 U. S., 153.

Estate of Twombley, 120 Cal., 350.

Irwin *vs.* Scriber, 18 Cal., 499.

Halleck *vs.* Moss, 22 Cal., 275-6.

The question as to which of the Superior Courts of the State is to take jurisdiction of an estate is regulated by the following provision of the Code of Civil Procedure:

Provision of the Code.

Sec. 1294. "Wills must be proved, and letters "testamentary or of administration granted:

"1. In the county *of which the decedent was a resi-* "*dent at the time of his death*, in whatever place he "may have died;

"2. In the county in which the decedent may "have died, leaving estate therein, he not being a "resident of the State;

"3. In the county in which any part of the estate "may be, the decedent having died out of the State, "and not resident thereof at the time of his death;

"4. In the county in which any part of the estate "may be, the decedent not being a resident of the "State, and not leaving estate in the county in which "he died.;

"5. In all other cases, in the county where ap- "plication for letters is first made."

The decision of the Court as to the existence of the jurisdictional fact of residence cannot be attacked collaterally.

Re Griffith, 84 Cal., 110.

[Mem.: There is no dispute as to the existence of the above jurisdictional facts here. The complainants themselves aver them. The bill expressly states *that Thomas H. Blythe was, at the time of his death, a resident of the City and County of San Francisco*, and that he left estate therein. Tr., pp. 6-7.]

SCOPE AND EFFECT OF PROBATE PROCEEDINGS.

Probate proceedings of the kind provided for in California have been held to be in the nature of proceedings *in rem*.

The William Hill Co. *vs.* Lawlor, 116 Cal., 359.
Kearney *vs.* Kearney, 72 Cal., 393.
State *vs.* McGlynn, 20 Cal., 269.
Broderick Will Case, 21 Wall., 509.
Grignon's Lessee *vs.* Astor, 2 How., 338.
Tompkins *vs.* Tompkins, 1 Story, 547.

In our State real and personal property are on substantially the same basis, so far as administration of the estates of decedents is concerned; and there is very little difference in the administration or proceedings between cases where there is a will and cases where there is none. In the case of a will, the document must be filed, with a petition for its admission to probate, and thereupon a day is fixed for the hearing, and it is made the duty of the Clery to give notice of such hearing by publication and by mail in the manner specified in the Code. If there be no will, the proceedings are instituted by the filing of a petition for letters of administration. The provisions of the Code of Civil Procedure in this latter regard are as follows:

Sec. 1371. "Petitions for letters of administra-
"tion must be in writing, signed by the applicant or

" his counsel, and filed with the Clerk of the Court, " stating the facts essential to give the Court juris- " diction of the case, and when known to the appli- " cant, he must state the names, ages, and residences " of the heirs of the decedent, and the value and " character of the property. If the jurisdictional " facts existed, but are not fully set forth in the peti- " tion, and are afterward proved in the course of ad- " ministration, the decree or order of administration " and subsequent proceedings are not void on ac- " count of such want of jurisdictional averments." Provisions where there is will.

Sec. 1373. "When a petition praying for letters " of administration is filed, *the Clerk must give notice* " *thereof* by causing notices to be posted in at least " three public places in the county, one of which must " be at the place where the Court is held, containing " the name of the decedent, the name of the appli- " cant, and the time at which the application will be " heard. Such notice must be given at least ten days " before the hearing."

(Compare Re Griffith, 84 Cal., 109.)

Sec. 1374. " Any person interested may contest " the petition by filing written opposition thereto, on " the ground of the incompetency of the applicant, or " may assert his own rights to the administration, " and pray that letters be issued to himself. In the " latter case the contestant must file a petition and " give the notice required for an original petition, " and the Court must hear the two petitions to- " gether."

Sec. 1375. " On the hearing, it being first proved " that notice has been given as herein required, the "Court must hear the allegations and proofs of the " parties ,and order the issuing of letters of adminis- " tration to the party best entitled thereto."

Sec. 1378. " Before letters of administration are " granted on the estate of any person who is repre-

"sented to have died intestate, the fact of his dying "intestate must be proved by the testimony of the "applicant or others, and the Court may also ex- "amine any other person concerning the time, place "and manner of his death, the place of his residence "at the time, the value and character of his prop- "erty, and whether or not the decedent left any will, "and may compel any person to attend as a witness "for that purpose."

Conclusiveness of probate decree.

The decree appointing an administrator is not only conclusive as against a collateral attack,

Irwin *vs.* Schreiber, 18 Cal., 499.
Re Griffith, 84 Cal., 110.

but is an adjudication which is binding by way of estoppel as to every matter involved in it, as, for example, the right to inherit, when involved in the right to administer.

Garwood *vs.* Garwood, 29 Cal., 515.
Estate of Pico, 56 Cal., 411.
Howell *vs.* Budd, 91 Cal., 349.

After the executor or administrator is appointed, it is his duty to take possession of all the assets of the deceased, cause to be made an inventory and appraisement thereof, and must administer the same under the direction of the Court, and account to it for his actions, until the purposes of the administration have been accomplished.

Speaking generally, the purposes of administration are

Mode of dealing with claims of creditors.

the preservation of the property and the application of the same to the payment of the creditors, so far as may be required, and the distribution of the remainder, if any, to those entitled either by a will or the laws as to succession. It is not material to consider the case of creditors. It may be remarked in passing, however, that all creditors, even those whose claims are contingent, are required to present sworn claims to the executor or administrator within ten months after the first publication of notice to creditors, if the estate exceed ten thousand dollars in value, and within four months if of less value.. If the claim be allowed by the executor or administrator, it must then be presented to the Judge, and if it receives his approval it is filed in the Court, and is "ranked among "the acknowledged debts of the estate, to be paid in due course of administration." Even claims involved in pending suits must be presented (C. C. P., Sec. 1502). So must judgments entered against the deceased in his lifetime, and no execution can issue upon such judgments except on judgments "for the recovery of real or personal prop- "erty or the enforcement of a lien thereon." (C. C. P., Secs. 1505 and 686.) If a claim be not presented within the required time, it "is barred forever." (C. C. P., Sec. 1493.) If either the executor or administrator reject a claim, the claimant must bring suit thereon "within three "months after the date of its rejection, if it be then due, "or within two months after it becomes due, otherwise "the claim shall be forever barred." (C. C. P., Sec. 1498.)

A money judgment against an executor or administrator in any such suit, "only establishes the claim in the same "manner as if it had been allowed by the executor or ad- "ministrator and a judge; and the judgment must be that "the executor or administrator pay in due course of ad- "ministration the amount ascertained to be due." No execution can issue on such judgment, nor does it create any lien on any property of the estate, or give any priority (C. C. P., Sec. 1504.)

Property in gremio legis.

In short, the property of the decedent is *in gremio legis.* The Court may, in proper cases, order its sale, and may marshal the assets, and has full equity powers for the purposes of the probate administration. And it may accord a jury trial to the parties entitled thereto. In all its proceedings, whether for the purpose of satisfying creditors or of distribution to heirs, the rules of practice in ordinary cases apply, as far as applicable, to probate proceedings (C. C. P., Sec. 1713), and this includes the practice as to new trials and appeals. (C. C. P., Sec. 1714.)

When the claims of creditors are all satisfied, what remains of the property is distributed to the persons entitled by will or succession. Three methods are provided for the adjudication of the rights of such persons. And as the amended and supplemental bills show an instance of the application of each of these three methods, it will perhaps be well to explain them in detail.

THE PROCEEDING TO DETERMINE HEIRSHIP.

The first method may be resorted to before the estate is ready for distribution, and is in effect a mode of settling the question in advance. The provision of the Code of Civil Procedure in regard to this method is as follows:

Code provision to determine heirship.

Sec. 1664. "In all estates now being administered, or that may hereafter be administered, any "person claiming to be heir to the deceased or entitled to distribution in whole or in any part of such "estate, may, at any time after the expiration of one "year from the issuing of letters testamentary or of "administration upon such estate, *file a petition* in the "matter of such estate, praying the Court to ascertain and declare the rights of all persons to said "estate and all interests therein, and to whom distribution thereof should be made. Upon the filing "of such petition, *the Court shall make an order directing service of notice* to all persons interested in said "estate to appear and show cause, on a day to be "therein named, not less than sixty days nor over "four months from the date of the making of such "order, in which notice shall be set forth the name of "the deceased, the name of the executor or administrator of said estate, the names of all persons who "may have appeared claiming any interest in said "estate in the course of the administration of the "same, up to the time of the making of said order, "and such other persons as the Court may direct, "and also a description of the real estate whereof said "deceased died seized or possessed, so far as known, "described with certainty to a common intent; and "requiring all said persons, and all persons, "named or not named, having or claiming "any interest in the estate of said deceased,

Code provision to determine heirship.

"at the time and place in said order specified, to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership, or interest in said estate, to said Court, *which notice shall be served in the same manner as a summons in a civil action;* upon proof of which service, by affidavit or otherwise, to the satisfaction of the Court, *the Court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties* in and to the property of said deceased, *and such determination shall be final and conclusive in the administration of said estate* and the title and ownership of said property. The Court shall enter an order or decree establishing proof of the service of such notice. All persons appearing within the time limited, as aforesaid, shall file their written appearance in person or through their authorized attorney, such attorney filing at the same time written evidence of his authority to so appear, entry of which apearance shall be made in the minutes of the Court and in the register of proceedings of said estate. And the Court shall, after the expiration of the time limited for appearing as aforesaid, enter an order adjudging the default of all persons for not appearing as aforesaid, who shall not have appeared as aforesaid. At any time within twenty days after the date of the order or decree of the Court establishing proof of the service of such notice, any of such persons so appearing may file his complaint in the matter of the estate, setting forth the facts constituting his claim of heirship, ownership, or interest in said estate, with such reasonable particularity as the Court may require, and serve a copy of the same upon each of the parties or attorneys who shall have entered their written appearance as aforesaid, if such parties or such attorneys reside within the county; and in case any of

Code provision to determine heirship

" them do not reside within the county, then service of " such copy of said complaint shall be made upon the " Clerk of said Court for them, and the Clerk shall " forthwith mail the same to the address of such party " or attorney as may have left with said Clerk his " postoffice address. Such parties are allowed " twenty days after the service of the complaint, as " aforesaid, within which to plead thereto, and " thereafter *such proceedings shall be had upon such com-* " *plaint as in this code provided in case of an ordinary* " *civil action;* and the issues of law and of fact arising " in the proceeding shall be disposed of in like manner " as issues of law and fact are herein provided to be " disposed of in civil actions, *with a like right to a* " *motion for a new trial and appeal to the Supreme* " *Court;* and the provisions in this Code contained " regulating the mode of procedure for the trial of " civil actions, the motion for a new trial of civil " actions, statements on motion for a new trial, bills " of exception and statements on appeal, as also in " regard to undertakings on appeal, and the mode of " taking and perfecting appeals, and the time within " which such appeals shall be taken, shall be appli- " cable thereto; provided, however, that all appeals " herein must be taken within sixty days from the " date of the entry of the judgment or the order com- " plained of. The party filing the petition as afore- " said, if he file a complaint, and if not, the party first " filing such complaint, shall, in all subsequent pro- " ceedings, be treated as the plaintiff therein, and all " other parties so appearing shall be treated as the " defendants in said proceedings, and all such de- " fendants shall set forth in their respective answers " the facts constituting their claim of heirship, " ownership, or interest in said estate, with such par- " ticularity as the Court may require, and serve a " copy thereof on the plaintiff. Evidence in support

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" of all issues may be taken orally or by depositions, " in the same manner as provided in civil actions. " Notice of the taking of such depositions shall be " served only upon the parties or the attorneys of the " parties so appearing in said proceeding. The " Court shall enter a default of all persons failing to " appear, or plead, or prosecute, or defend their " rights, as aforesaid; and upon the trial of the " issues arising upon the pleadings in such proceed- " ings, *the Court shall determine the heirship to said de-* " *ceased, the ownership of his estate, and the interest of* " *each respective claimant thereto or therein, and persons* " *entitled to distribution thereof, and the final determina-* " *tion of the Court thereupon shall be final and conclusive* " *in the distribution of said estate, and in regard to the* " *title to all the property of the estate of said deceased.* " The cost of the proceedings under this section shall " be apportioned in the discretion of the Court. In " any proceeding under this section, the Court may " appoint an attorney for any minor mentioned in " said proceedings not having a guardian. Nothing " in this section contained shall be construed to ex- " clude the right, upon final distribution, of any " estate to contest the question of heirship, title, or " interest in the estate so distributed, where the " same shall not have been determined under the " provisions of this section; where such questions " shall have been litigated under the provisions of " this section, *the determination thereof as herein pro-* " *vided, shall be conclusive in the distribution of said* " *estate.*"

See, as to the effect of this section.

Estate of Oxarart, 78 Cal., 109.

The averments of the complainants' pleadings in relation to the proceedings in the estate of Thomas H. Blythe,

Decision of the Supreme Court.

under the provision just quoted have already been referred to (pp. 8-11 hereof). The first appeal to the Supreme Court from the decree of the Superior Court mentioned in complainants' pleadings was taken by a set of claimants known as the "Williams heirs." Counsel for the other claimants (including the claimants here) were heard as *amici curiae*. The result of the appeal was the affirmance of the decree of the Probate Court, upon the ground that the deceased had instituted the appellee Florence his heir.

Blythe *vs.* Ayres, 96 Cal., 532.

The matter was again brought before the Court upon the appeal of The Blythe Company, (the cross-complainant in the case at bar), and the appeal of the complainants in the case at bar. The Court approved and followed its previous decision, but in addition to the grounds there adjudged, held that the several appellants had no standing, because they had not attacked the finding that they or their assignors were not of kin to the deceased, but were mere strangers, and hence it made no difference to them whether the appellee here was entitled or not.

Blythe *vs.* Ayres, 102 Cal., 254.

This decision was approved upon a subsequent appeal, by an alleged wife of the deceased, from the same decree.

Hinckley *vs.* Ayres, 105 Cal., 358.

Blythe *vs.* Ayres, 102 Cal., 262.

The matter again came before the Supreme Court upon an application of the complainants here to dismiss the proceeding to determine the heirship. In this also the complainants met defeat.

Re Blythe, 110 Cal., 226.

THE DECREE OF PARTIAL DISTRIBUTION.

The second method in which the question of the appellee's right as to inherit the property of Thomas H. Blythe, deceased, was adjudicated was the decree of partial distribution of the Probate Court.

The question of a claimant's right to inherit may be litigated and determined on an application for partial distribution.

Re Jessup, 81 Cal., 408.

There are two sets of statutory provisions for partial distribution, which to some extent overlap each other. This condition of affairs came about from legislative carelessness in making amendments to the Code. But this feature is not material in this connection. The two sets of provisions are as follows:

Sec. 1658. "At any time after the lapse of four "months from the issuing of letters testamentary or "of administration, any heir, devisee, or legatee may "present his petition to the Court for the legacy or "share of the estate to which he is entitled, to be

"given to him upon his giving bonds, with security "for the payment of his proportion of the debts of "the estate."

Code provisions partial distribution

Sec. 1659. "Notice of the application must be "given to the executor or administrator, personally, "and to all persons interested in the estate, in the "same manner that notice is required to be given of "the settlement of the account of an executor or ad-"ministrator."

Sec. 1661. "If at the hearing, it appears that the "estate is but little indebted, and that the share of "the party applying may be allowed to him without "loss to the creditors of the estate, the Court must "make an order in conformity with the prayer of the "applicant, requiring:

"1. Each heir, legatee, or devisee, obtaining such "order, before receiving his share, or any portion "thereof, to execute and deliver to the executor or "administrator a bond, in such sum as shall be desig-"nated by the Court, or a Judge thereof, with sure-"ties to be approved by the Judge, payable to the "executor or administrator, and conditioned for the "payment, whenever required, of his proportion of "the debts due from the estate, not exceeding the "value or amount of the legacy or portion of the "estate to which he is entitled.

"2. The executor or administrator to deliver to "the heir, legatee, or devisee, the whole portion of "the estate to which he may be entitled, or only a "part thereof, designating it. If, in the execution of "the order, a partition is necessary between two or "more of the parties interested, it must be made in "the manner hereinafter prescribed. The costs of "these proceedings shall be paid by the applicant, "or if there be more than one, shall be apportioned "equally amongst them."

Sec. 1663. "At any time after the lapse of one

Code provisions for partial distribution.

"year from the issuance of letters testamentary, or "of administration, any heir, devisee, or legatee may "present his or her petition to the Court for the dis- "tribution of the net proceeds of the share of the "said estate to which he or she will be entitled. "*Notice of the application must be given*, as required by "Section sixteen hundred and fifty-nine. *The executor* "*or administrator, or any other person interested in the* "*estate, may appear at the time named and resist the* "*application*, or any other heir, devisee, or legatee "may make a similar application for himself. If at "the hearing it appears that the estate is but little "indebted, and that the share of the party applying "may be allowed to him without loss to the creditors "of the estate, the Court must make an order in con- "formity with the prayer of the applicant, requiring:

"1. Each heir, legatee, or devisee, obtaining such "order, before receiving his share, or any portion "thereof, to execute and deliver to the executor or "administrator a bond, in such sum as shall be desig- "nated by the Court, or a Judge thereof, with sure- "ties to be approved by the Judge, payable to the "executor or administrator, and conditioned for the "payment, whenever required, of his proportion of "the debts due from the estate, not exceeding the "amount or portion of the proceeds of the estate "which he has received; provided, that where the "time for filing or presenting claims has expired, and "all claims that have been allowed have been paid, "or are secured by mortgage upon real estate suffi- "cient to pay them, and the Court is satisfied that "no injury can result to the estate, the Court may "dispense with the bond.

"2. The executor or administrator to deliver to "the heir, legatee, or devisee the proceeds of the "estate to which he may be entitled, or only a part "thereof, designating it. If in the opinion of the "Court, it be necessary, in order to ascertain the pro-

"ceeds that any or all of the heirs, legatees, or devi-
"sees may be entitled, that the interest of any heir,
"legatee, or devisee in one or more pieces or parcls
"of property of the estate shall be determined or
"ascertained, the Court may suspend proceedings
"and direct the petitioner or petitioners to take pro-
"ceedings under Section sixteen hundred and sixty-
"four of this Code to ascertain the interest the peti-
"tioner or petitioners will have under the will in any
"piece or parcel of property. The order must de-
"scribe the property in relation to which proceedings
"are to be taken. Whenever any bond has been
"executed and delivered, proceedings upon any such
"bond may be taken under Section sixteen hundred
"and sixty-two. The cost of these proceedings shall
"be paid by the applicant, or if there be more than
"one, shall be apportioned equally between them."

Proceed
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The averment of the complainants' pleadings in relation to the proceedings on partial distribution have been already referred to (pp. 13-14 hereof).

A decree of partial distribution is appealable.

Estate of Mitchell, 121 Cal., 393.

And the appeal must be taken within sixty days.

C. C. P., Sec. 1715.

The pleadings do not show whether or not the complainants here took an appeal from this decree. But the decision on the appeal which they in fact took is shown at page 227 of volume 110 of the California Reports. And the records of this Court will show that the complainants here sued out a writ of error to this Court,

and that such writ was by this Court dismissed "for want "of jurisdiction."

Blythe *vs.* Hinckley, 167 U. S., 746.

The Blythe Company (the cross-complainant herein) took an appeal from the decree of partial distribution. But, while expressing satisfaction with its previous decisions, the Court held that as The Blythe Company itself had no right, it could not question the decree awarding the property to the appellee here.

Re Blythe, 112 Cal., 689.

THE DECREE OF FINAL DISTRIBUTION.

The question of the right to inherit may be litigated and determined on an application for final distribution.

Re Oxarart, 78 Cal., 109.

The provisions of the Code of Civil Procedure in relation to the matter are as follows:

Sec. 1665. "Upon the final settlement of the ac- "counts of the executor or administrator, or at any "subsequent time, upon the application of the ex- "ecutor or administrator, or of any heir, legatee or "devisee, the Court must proceed to distribute the "residue of the estate in the hands of the executor "or administrator, if any, among the persons who "by law are entitled thereto; and if the decedent has "left a surviving child, and the issue of other child- "ren, and any of them, before the close of the admin- "istration, have died while under age and not having

Code provisions for final distribution.

"been married, no administration on such deceased "child's estate is necessary, but all the estate which "such deceased child was entitled to by inheritance "must, without administration, be distributed to the "other heirs-at-law. A statement of any receipts "and disbursements of the executor or ad- "ministrator, since the rendition of his final "accounts, must be reported and filed at the time of "making such distribution; and a settlement thereof, "together with an estimate of the expense of closing "the estate, must be made by the Court, and included "in the order or decree; or the Court or Judge may "order notice of the settlement of such supplemen- "tary account, and refer the same as in other cases "of the settlement of accounts."

Sec. 1666. "In the order or decree, the Court must "name the persons and the proportions or parts to "which each shall be entitled, and such persons may "demand, sue for, and recover their respective shares "from the executor or administrator, or any person "having the same in possession. *Such order or de-* "*cree is conclusive as to the rights of heirs, legatees or* "*devisees*, subject only to be reversed, set aside or "modified on appeal."

Sec. 1668. "The order or decree may be made on "the petition of the executor or administrator, or of "any person interested in the estate. *Notice of the* "*application must be given by posting or publication as* "*the Court may direct, and for such time as may be or-* "*dered.* If partition be applied for as provided in "this chapter, the decree of distribution shall not "divest the Court of jurisdiction to order partition, "unless the estate is finally closed."

The decree of final distribution is expressly made conclusive by Section 1666 above quoted. And the decisions are explicit upon this question.

Thus a decree of distribution to trustees is a conclusive adjudication of the validity of the trust, as not being within the rule against perpetuities, and the question cannot be raised by a bill in equity.

Crew *vs.* Pratt, 119 Cal., 139.

So the decree of distribution is conclusive as to the construction of the will, even though the decree was made while the bill in equity was pending.

Goad *vs.* Montgomery, 119 Cal., 552.

After a decree of distribution has become final, either with or without an appeal, the only question is as to the construction of the decree. In a suit to quiet title, the party cannot go back to the will.

Jewell *vs.* Pierce, 120 Cal., 79.

Nor can a bill in equity be maintained to restrain the execution of a decree in equity on the ground that it is erroneous both as to the law and the facts.

Daley *vs.* Pennie, 86 Cal., 552.

And the rule applies to everything which *might* have been litigated on the application for distribution.

The Wm. Hill Co. *vs.* Lawler, 116 Cal., 359.

Crew *vs.* Pratt, 119 Cal., 149.

Freeman *vs.* Rahm, 58 Cal., 111.

The averment of the complainants in the case at bar in regard to the proceedings on final distribution has already been considered (See pp. 15-17 hereof). The pleader

does not state that any appeal from this decree was taken to the Supreme Court, but the reports show that the complainants here did take such an appeal and that it was dismissed, the Court saying: "The appellants are con-"cluded by the decisions of this Court upon their other "appeals. They are no longer parties in interest."

Re Blythe, 115 Cal., 553.

A similar decision was made upon the appeal of The Blythe Company, the cross-complainant herein.

Re Blythe, 115 Cal., 554.

OUTLINE OF THE ARGUMENT.

We shall argue that the decisions of the State Courts referred to in the bills are conclusive against the appellant's claims, and that the bills show no valid ground for attacking or disregarding them; that the State laws permitting aliens to inherit ,and in relation to the institution of heirship, are not in conflict with any treaty, or an invasion of the treaty-making power, or in violation of any Federal provision, but are valid laws; that, even if it were otherwise, the decisions of the State Courts of Probate cannot be attacked in the present suit, because said Courts are Courts of general jurisdiction to whose administration matters of probate are expressly confided, and that no review of their decisions, except on appeal, or any retrial of the questions determined by them, is permitted by the State law, or permissible in the Federal Courts.

We shall further argue that no Constitutional question is involved in the case; that the bills show no ground of Federal jurisdiction, as was, in effect, decided by this Court on writ of error to the State Supreme Court; that, inasmuch as the Circuit Court decided, among other things, that the bills show no equity, and as this Court cannot consider the correctness of that decision on certificate, it disposes of all the appellant's interest; and that it would do the appellants no good to reverse the only part of the decree which is before this Court.

I.

THE JUDGMENTS OF THE STATE COURTS ARE CONCLUSIVE AGAINST THE RIGHT OF THE APPELLANTS TO MAINTAIN THIS SUIT.

The following propositions cannot be denied or disputed, viz.: that the Superior Court of San Francisco is a Court of general jurisdiction (pp. 27-8 hereof); that said Superior Court is the only State Court authorized to take original jurisdiction of "matters in probate"; that, inasmuch as it is expressly averred that Thomas H. Blythe died *a resident of the City and County of San Francisco*, and left estate therein (Tr., p. 6-7, and p. 29), the Superior Court of San Francisco had jurisdiction to administer on his estate (see p. 29 hereof); that said Court three times decreed that Thomas H. Blythe had instituted the appellee his heir; that these decrees were repeatedly affirmed

by the highest Court of the State; that, so far as the State law can make them so, such decrees are final and conclusive; that no attempt was ever made to remove any part of the proceedings to the local Federal Court; that a writ of error from this Court was sued out by the complainants here and that such writ was dismissed for want of jurisdiction; that no sort of fraud, concealment, or unfairness in the proceedings before any of the State Courts is charged by the complainants; but, on the contrary, that it is expressly averred that the fact of the non-resident alienage of the appellee Florence at the time of descent cast "*was made plainly to appear*" to the State Courts.

Such being the case, the question suggests itself as to why these adjudications of the State Courts should be treated as absolute nullities, and void on a collateral attack, as is sought to be done by the appellants here. Let us examine the reasons presented in support of such position:

(1). The bills state in general terms that the State Courts decided in favor of the appellee "without any jurisdiction so to do" (Tr., p. 10, and p. 32), and that their determinations were "idle forms" (Tr., p. 11, and p. 12), and "a fraud upon the laws of the United States and upon the "complainants" (Tr., p. 34).

As a general rule, mere epithets and conclusions are unavailing in a bill in equity.

Van Weel *vs.* Winston, 115 U. S., 237-8.

Fogg *vs.* Blair, 139 U. S., 127.

Dillon *vs.* Barnard, 21 Wall., 437.
U. S. *vs.* Ames, 99 U. S., 45.
Pullman Co. *vs.* Mo. Pac. Co., 115 U. S., 596.

This general rule applies to averments of want of jurisdiction.

Hanford *vs.* Davies, 163 U. S., 279.
Ritchie *vs.* McMullen, 159 U. S., 241-2.
Leavey *vs.* Long, 131 U. S. (Appendix CCXVIII).

We therefore dismiss these phrases from consideration.

(2). The bill puts forward, as one of the reasons why the decrees of the State Courts were utterly void, the statement that the decision of the State Supreme Court in favor of the appellee was in conflict with its previous decision (Tr., p. 10). The decision in favor of the appellee was based upon Section 1387 of the Civil Code (quoted on p. 7 hereof), providing the way in which the father of an illegitimate child could institute such child his heir (Blythe *vs.* Ayres, 96 Cal., 532). It is in this particular that the decision is claimed to be in conflict with previous decisions. The State Court gave reasons for not considering the previous decisions as binding authority (96 Cal., p. 590). But we are not concerned with the sufficiency of those reasons.

Passing, for a moment, the alienage question, the State Legislature has the unquestioned power to provide for inheritance by illegitimate children.

Lessee of Brewer *vs.* Blougher, 14 Pet., 178.

And the interpretation of State statutes, within their power to enact, is the peculiar province of the State Courts, whose decisions thereon are binding upon the Federal Courts.

Baltimore Co. *vs.* Baltimore Belt Co., 151 U. S., 137.
Forsyth *vs.* Hammond, 166 U. S., 518-19.
Oakes *vs.* Mase, 165 U. S., 364.
Balkam *vs.* Woodstock, 154 U. S., 188-9.
Bauserman *vs.* Blunt, 147 U. S., 647.
Morley *vs.* Lake Shore Ry., 146 U. S., 167.
McIlvaine *vs.* Brush, 142 U. S., 155.
South Branch Co. *vs.* Ott, 142 U. S., 628.
Chicago Bank *vs.* Kansas Bank, 136 U. S., 235.
Gormley *vs.* Clark, 134 U. S., 348.
Peters *vs.* Bain, 133 U. S., 670.
Hanrick *vs.* Patrick, 119 U. S., 169.
McArthur *vs.* Scott, 113 U. S., 391.
Claiborne County *vs.* Brooks, 111 U. S., 410.
Moores *vs.* Nat. Bank, 104 U. S., 625.
Orvis *vs.* Pavill, 98 U. S., 177.
Walker *vs.* State Harbor Cmrs., 17 Wall., 648.
Leffingwell *vs.* Warren, 2 Black, 603.
Suydam *vs.* Williamson, 24 How., 427.
Green *vs.* Lessee of Neal, 6 Pat., 291.
Elmendorf *vs.* Taylor, 10 Wheat., 159.

This principle is carried so far that where a federal Court decides a new question of State law, and the State Courts subsequently take a different view of it, the fede-

ral Courts will abandon their decision and follow the State Courts.

Bauserman *vs.* Blunt, 147 U. S., 647.
Oakes *vs.* Mase, 165 U. S., 364.

And so, where the State Court decides a State question, and this Court follows it, and the State Court subsequently changes its view, this Court will change also, and follow the State Court in its new view.

Green *vs.* Lessee of Neal, 6 Pet., 291.
Suydam *vs.* Williamson, 24 How., 427.

In other words, the federal Courts will follow the latest decision of the State Court upon State questions. And such is the present doctrine of this Court.

It is idle, therefore, to complain to the federal Court that the State Court has overruled its own decisions. Even if the State Court should disregard a decision *of this Court* upon a State question, this Court would not interfere.

Giles *vs.* Little, 134 U. S., 648-9.

Nor is there any question here of the exceptional case of negotiable instruments acquired for value upon the faith of a State decision such as was presented in Gelpcke *vs.* Dubuque (1 Wall., 175). Such a feature does not enter into the question whether the appellee was in-

stituted an heir of her father, or whether the appellants were his next of kin.

Bacon *vs.* Texas, 163 U. S., 221.
Hanford *vs.* Davies, 163 U. S., 273.

Nor is the commission of error in decisions upon State questions the invasion of a federal right.

Arrowsmith *vs.* Harmoning, 118 U. S., 194.
Re Converse, 137 U. S., 631.
Leffingwell *vs.* Warren, 2 Black, 603.

(3). The bill charges that the State statute permitting aliens to inherit is in conflict with *the State Constitution* (Tr., p. 10). The provision of the Constitution of 1849 was as follows:

> Sec. 17 (Art. 1). "Foreigners who are or who may "hereafter become *bona fide* residents of this State "shall enjoy the same rights in respect to the pos- "session, enjoyment, and inheritance of property as "native-born citizens."

The construction which this received was that the alien must be a resident at the time of descent cast (Farrell *vs.* Enright, 12 Cal., 450); but that the Constitution was *not a grant of, but a limitation upon* legislative power, and that the Legislature could extend privileges to aliens who did not come within the class designated by the Constitution, and that, consequently, the Legislature could

permit non-resident aliens to inherit if they appeared and claimed the property within a fixed period.

People *vs.* Rogers, 13 Cal., 160.

In 1874, the Legislature enacted the Civil Code, which contains the following provisions:

Sec. 671 "Any person, *whether citizen or alien*, may "take, hold, and dispose of real property, real or per- "sonal, within this State" [in effect July 1, 1874].

Sec. 672. "If a non-resident alien takes by succes- "sion, he must appear and claim the property within "five years from the time of succession or be barred. "The property, in such case, is disposed of as pro- "vided in Title VIII, Part III, Code of Civil Pro- "cedure" [escheat].

Sec. 1404. "Resident aliens may take in all cases "by succession as citizens; and no person capable of "succeeding under the provisions of this title is pre- "cluded from such succession by reason of the alien- "age of any relative; but no non-resident foreigner "can take by succession unless he appears and claims "such succession within five years after the death "of the decedent to whom he claims succession."

These provisions have not been repealed. In 1879, the State adopted a new Constitution which contained the following provision [supposed to have been aimed by its sponsors at Mongolians]:

Sec. 17 (Art. 1). "Foreigners *of the white race or* "*of African descent*, eligible to become citizens of "the United States, under the naturalization laws "thereof, while *bona fide* residents of this State, shall "have the same rights in respect to the acquisition,

"possession, enjoyment, transmission and inheri-
"tance of property as native-born citizens."

But the same construction was given to this as was given to the corresponding provision in the preceding Constitution, *i. e.*, that it was a limitation upon, and not a grant of, legislative power, and that, under the Code provisions above quoted, aliens could inherit.

State *vs.* Smith, 70 Cal., 153.
Estate of Billings, 65 Cal., 593.
Lyons *vs.* The State, 67 Cal., 380.
Carrascos *vs.* The State, 67 Cal., 385.

These decisions were cited to the State Supreme Court, upon the appeal from the decree of heirship (see 96 Cal., 543), and, as we are informed by the bills here, the fact of non-resident alienage was "made plainly to appear" (Tr., p. 9). But the proposition was so thoroughly settled that the Court did not see fit to notice it. And it is manifest that the above construction is correct; for State Constitutions are considered as limitations upon, and not as grants of, legislative power (Giozza *vs.* Tiernan, 148 U. S., 661.) And Section 22 of Article 1, providing that the various provisions of the Constitution shall be regarded as "mandatory and prohibitory," has not the slightest bearing upon the scope of the various provisions. Its only purpose was to prevent any provision from being held to be "directory" merely, a construction which had, in some instances, been given to constitutional provisions.

But, whether the construction of the State Court was right or not, it is nevertheless the settled construction of that Court; and the federal Courts are bound by that construction. The decisions of this Court make it clear that it will not enquire whether a State statute is in collision with the State Constitution.

Long Island Co. *vs.* Brooklyn, 166 U. S., 688.
Adams Express Co. *vs.* Ohio, 165 U. S., 219.
Norton *vs.* Shelby County, 118 U. S., 439.
Fallbrook Ir. Co. *vs.* Bradley, 164 U. S., 155.
Miller *vs.* Cornwall Ry. Co., 166 U. S., 519.
Stutsman *vs.* Wallace, 142 U. S., 306.
Gut *vs.* The State, 9 Wall., 35.

It is of no avail to the appellants that one of their bills states that "neither the said Superior Court nor the said "Supreme Court *considered adjudged or construed*, in "making its decision, the said Section 17, of Article I, "and said Section 22, of Article I, of the Constitution of "the State of California; nor were the rights of your ora-"tors under those sections adjudged or determined by "either of said Courts, or by its decision" (Tr., p. 10).

The question of the capacity of the alien to inherit *was necessarily involved in and determined by the decrees that she did inherit.* If that question was so determined, it would not make the slightest difference whether the Court "considered or construed" any particular provision or not. But it might be added that the mental process

of the Justices of the State Court is not something which the pleader could know anything about; nor is it a thing which the Federal Courts will inquire into. And certainly, defeated litigants cannot be heard to say that the State Courts did not give due consideration to the legal bearings of facts which were "made plainly to appear" to them, as was the case here (see Tr., pp. 10, 11, 31, 32, and 35), and concerning which the report shows that the decisions were cited (see 96 Cal., p. 543).

(4). The bills charge that the provisions permitting aliens to inherit are in contravention of Section 1978 of the U. S. Revised Statutes (Tr., pp. 32 and 34). That section is as follows:

> Sec. 1978. "All *citizens* of the United States shall "have *the same* right, in every State and Territory, "*as is enjoyed by white citizens thereof* to inherit, pur- "chase, lease, sell, hold and convey real and personal "property."

Several observations upon this section at once present themselves. In the first place, it applies only to "citizens"; and the refrain of the appellant's song is that the appellee was not a citizen. In the second place, the purpose of the provision was merely to put all citizens on an equality with "white" citizens. It does not require any particular plane. It does not undertake to enact what rights white citizens shall have. It would not be infringed if, in the matter of inheritance, no rights at all should be given to white citizens. It leaves that to the

States, only requiring that all citizens shall be treated alike in the respects mentioned. Now, the bill does not allege that the appellants are not white citizens. For all that appears to the contrary, they are of the same color with the appellee. Nor do the provisions permitting aliens to inherit as if they were citizens make any distinction as to color. The section has not the remotest bearing upon the case in hand.

(5). The third amended and supplemental bill charges that "said Section 1387 does not, in terms, operate beyond "the geographical boundaries of the State of California, "and it had no operation or effect at any time in the King-"dom of Great Britain, nor did any alleged action under "it; and it had no operation or effect upon said Florence "or her right to said real property at the time of descent "cast or prior thereto, nor did said judgment so operate." (Tr., p. 34.)

The property, however, is in California, and Thomas H. Blythe was a citizen of California, and the document which formed the basis of the State decisions was executed in California, in the form provided by the laws of California. That the property is in the State is expressly averred. It is also averred that Blythe was a citizen and resident of the State at the time of his death "and before" (Tr., p. 29). It is not averred that he was not a citizen and resident at the time the document was executed; and since the presumption is not only in favor of the regularity of the judgments of a Court of general jurisdiction, but

is also against the pleader, it must be assumed that he was a citizen and resident at the time in question; and the decision of the Supreme Court shows that the document was executed in accordance with the forms required by the laws of California. The question is, therefore, whether a citizen and resident of California can, by complying with the forms prescribed by the local laws institute his illegitimate child, who is a non-resident alien, his heir, so far as property in the State is concerned. To state this is to sufficiently answer it. So far as the question of the operation of the State laws outside the limits of the State is concerned, what is the essential difference between executing an institution of heirship and executing a will? But would any one contend that a will of property in California could not be made in favor of a non-resident alien? The State Courts may, if they catch an alien here, even compel him to act according to their notions of equity, even as to land in a foreign country. (Cole *vs.* Cunningham, 133 U. S., 107.)

The State Supreme Court gave a very thorough consideration to the matter (see 96 Cal., 561-576), and we do not think it necessary to add anything to the reasoning of the learned Justice who wrote the opinion. His conclusion was plainly right.

But, whether right or wrong, the State decisions are in our favor; and, aside from the operation of any federal provision (which we shall consider below), the State deci-

sions as to the operation of the State laws are conclusive, so far as State property is concerned.

It may be added, however, that the point is merely another way of phrasing the proposition that an alien cannot inherit. For suppose that the appellee had been born in California of a California mother, but had taken up her permanent residence in England, and had been a nonresident at the time of the institution of her heirship and at the time of descent cast! Could not the same argument as to the operation of the California law beyond the State boundaries have been made? But what Court would pay any attention to it? Now, the only difference between that supposed case and the case made by the bill is the alienage of the illegitimate child. But if an alien can inherit lands in this State, she can certainly be instituted heir to such lands. Therefore, we say that the position is merely another way of phrasing the alienage question. *So far as the State law is concerned*, the right of aliens to inherit, and, consequently, to be instituted heirs, is clear to a demonstration. Leaving it, we proceed to examine whether there is any federal provision which nullifies the State laws on the subject.

(6). The appellants contend that there is such federal provision, and in this regard the bill refers to Section 10, of Article I, of the Constitution of the United States, which provides that "no State *shall enter into any treaty*, alliance or confederation." In this regard, the third amended and supplemental bill charges that—

"said sections [permitting aliens to inherit], and "each of them, in an encroachment upon, and an in- "vasion and violation of and a substitution for the "treaty-making power of the United States, and, if "enforced, operate as treaty provisions between the "State of California and all foreign governments, "and were, and each of them is, void and in conflict "with and forbidden by Section 10, Article I, of the "Constitution of the United States, and with the "treaty-making power thereof" * * * (Tr., p. 33).

And, in regard to the Section providing for the institution of heirship, this bill charges that—

"said section, as construed by the Court, was and is "against Article I, Section X, of the Federal Consti- "tution, and an invasion of the jurisdiction of inter- "national intercourse between the United States "Government and the Government of England, "which jurisdiction is exclusively with the United "States, and was and is unconstitutional and void "because thereof, and because of a lack of power and "jurisdiction in California or its Courts to give said "statute the operation which it was adjudged by "said Court to have, and invades the treaty-making "power of the United States." (Tr., p. 8.)

So much for the "treaty-making power." With reference to actual treaties the showing is as follows: The second amended and supplemental bill charges that—

"the laws in force in the State of California in the "year 1883, when the said Thomas H. Blythe died, "relating to the rights of foreigners and aliens to "take real property by succession as heirs-at-law of

> "a deceased citizen of California, were *the treaty of* "*1894* between his Britannic Majesty and the United "States" * * * (Tr., p. 8).

No specific part of such treaty is referred to. The third amended and supplemental bill avers that Sections 671 and 672 (permitting aliens to inherit) and Section 1387 (in relation to the institution of heirship)—

> "are and each of them is in conflict with *existing* "*treaties* between the United States of America *and* "*Russia and Switzerland and France* and England" (Tr., p. 36).

The only provision of the federal Constitution referred to in these bills is Section 10, of Article I, providing that "no State shall enter into any treaty, alliance, or con- "federation." It would seem ludicrous to say that the Code provisions referred to constitute a treaty. They no more constitute a treaty than they constitute an alliance or a confederation. And, notwithstanding some of the language of the bill, we hardly think that the contention is that the legislative provisions in question constitute a treaty. The idea seems to be that they deal with subjects which either are or might be regulated by a treaty; and that, for that reason, they are not only void, but infect with invalidity the judgments of Courts of general jurisdiction based upon them.

If it is necessary to do more than state such wild imaginings, we would submit, first, that there is no treaty covering the case; second, that said legislative provisions

are not an invasion of the treaty-making power; and, third, that even if said provisions were an invasion of the treaty-making power, or a violation of an existing treaty, it would not make void the judgments of State Courts of general jurisdiction. We proceed to consider these propositions separately.

a. There is no treaty which covers the case. The bills aver that the appellee was at the time of descent cast a British subject. Such being the case we do not dwell upon the vague averment that the Code provisions referred to are in conflict with treaties between the United States "and Russia and Switzerland and France." It is sufficient to say that there is no treaty with either of those powers which deals with the rights which the United States shall accord to British subjects. The only averment as to a treaty with Great Britain is a vague reference to the treaty of 1794. But that treaty relates only to the aliens who held lands at the date of that treaty.

Harden *vs.* Fisher, 1 Wheat., 300.

No other treaty is mentioned, and there is none which covers the case. (See the volume of "Treaties and con-"ventions concluded between the United States of Amer-"ica and other Powers," published by the Government Printing Office in 1889.) The questions certified, or some of them, proceed upon the basis that no such treaty exists. (See question X, p. 52, and questions XIII, XIV, and XV, p. 53.) Nor have we any reason to suppose from the

course of the litigation up to this point that it will be claimed that any such treaty exists.

If there was any treaty on this subject, it would be in our favor. For no nation—and certainly not Great Britain—would be guilty of the barbaric folly of stipulating for the imposition of disabilities upon her own subjects.

b. The provisions of the Code are not an invasion of the treaty making power. If the provisions of the California Code permitting aliens to inherit are an invasion of the treaty making power, and for that reason void, it must follow that any State provision on the subject would be equally void for the same reason. In other words, if a provision *permitting* aliens to inherit be an invasion of the treaty making power, a provision *forbidding* aliens to inherit must be so too. In still other words, any provision on the subject, one way or the other, must be void. Now it would not increase the power of the State that it adopted other provisions along with the forbidden provision. If it has no power to adopt such a provision by itself, it has no power to adopt it as part of a system. Therefore, the statute of California adopting the common law as the basis of her jurisprudence, could not operate as a law against inheritance by aliens. The necessary result of the appellants' position would be that there is not, and never has been, *any* law in force in the State (or in any other State) either for or against inheritance by aliens. And there cannot be, except at the will and pleasure of foreign nations, for no nation need make any treaty on the sub-

ject unless it sees fit to do so. And it would not help the matter to say that the federal Courts could intervene. For if we assume that the federal Courts have any probate jurisdiction as such, i. e., aside from a "controversy" between parties, they have no power to make laws, but only to expound and apply them; and, upon the appellants' argument there would be no law to administer, and could not be without the consent of foreign nations.

But this is not the only absurdity which would result from the sanction of the appellants' position. Anything relating to the rights of aliens may be the subject of a treaty.

Geffroy *vs.* Riggs, 133 U. S., 267.

Their lives and liberties are as much within the treaty making power as their property. Hence (according to the logic of appllants' position) all the State laws protecting them for murder, rapine and other violence, are "an inva- "sion of the treaty making power" and void. No Court would have any jurisdiction to enforce such void laws, and all the State judgments in that regard would be without jurisdiction and mere "idle forms."

Upon the same principle the State laws as to marriage would not apply to aliens within their borders, either with other aliens, or with women of the State, and such marriages could not be recognized even as to property within the State. So the State law of wills would not apply to the wills of aliens either resident or non-resident. So the

State law of escheat would not apply to the property of aliens within the State. And the principle could not be confined to the individual rights of aliens. It would have to apply to their corporate rights as well. And the result would be that the State laws would not apply to foreign corporations doing business in their territory.

The principle would have to be extended even further. Treaties are on the same footing as laws.

> Whitney *vs.* Robertson, 124 U. S., 190.
> The Chinese Exclusion Case, 130 U. S., 600.
> Horner *vs.* U. S., 143 U. S., 571.
> Fong Yue Ting *vs.* U. S., 149 U. S., 720-1.

So that if the treaty making power be so exclusive in its nature as, though unexercised, to nullify all State legislation upon subjects as to which a treaty *might* be made, it would follow that there would be similar results as to State legislation upon any and all subjects as to which a federal law *might* be enacted. It is hardly necessary to say that such is not the case. We have not thought it necessary to explore the authorities in relation to concurrent powers of the Federal and State Governments. We give, however, in a note on the next page a few cases which have fallen under our notice.

But we are not left to general reasoning. The very question which the appellants seek to agitate has long

ago been settled by the repeated decisions of this Court, as we now proceed to show.

In Chirac *vs.* Chirac, (2 Wheaton, 259) it was held that alien heirs could inherit from a naturalized citizen of Maryland, because the statute of the State so provided, the Court, speaking through Chief Justice Marshall, saying: "*This question depends on the laws of Maryland.*" The law of that State (like the law of California) provided that the alien heir should appear and claim the property within a fixed period. The Court said that this operated as a condition subsequent, but that its performance was dispensed with by a later treaty. [Mem.: *It is not averred here that the appellee did not appear and claim the property within the required period;* and the contrary is to be inferred from the record.]

In Spratt *vs.* Spratt (1 Peters, 343), one of the lots in controversy was adjudged to pass to an alien heir by virtue of a State statute. Chief Justice Marshall, delivering

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Note. Bridging, improving and regulating navigable waters.
Willamette Bridge Co. *vs.* Hatch, 125 U. S., 1.
Cardwell *vs.* Am. Bridge Co., 113 U. S., 205.
Escanaba Co. *vs.* Chicago, 107 U. S., 678.
Packet Co. *vs.* Catlettsburg, 105 U. S., 559.
Pound vs. Turck, 95 U. S., 459.

Counterfeiting foreign bonds.
U. S. *vs.* Arjona, 120 U. S., 480.

Laws relating to the militia.
Presser *vs.* Illinois, 116 U. S., 252.

Laws relating to crimes on board a foreign ship in a local port.
Wildenhus' Case, 120 U. S., 1.

A statute of limitations for suits which might be removed to the federal Courts.
Mitchell *vs.* Clark, 110 U. S., 631.

Bankruptcy and insolvency laws.
Butler *vs.* Gorley, 146 U. S., 303.

the opinion saying: "*The title to the lots in controversy de-*
"*pends on the construction of an act of the State of Maryland.*"

The case came before the Court a second time, and was again disposed of upon a consideration of the State statute, the Court saying: "Since aliens are incapable of taking by descent, the answer to this question *depends on* "*the enabling act of the State of Maryland* in the year 1791."

Spratt *vs.* Spratt, 4 Peters, 393.

In Levy *vs.* M'Cartee (6 Peters, 102), the question was whether, in New York, a citizen could inherit collaterally from another citizen, when the former must make his pedigree through mediate alien ancestors. It was held that he could not. But this result was arrived at upon a consideration of the New York law. And Mr. Justice Story, delivering the opinion, said: "*The question is one* "*of purely local law*, and as such must be decided by this "Court." (p. 109.)

In Beard *vs.* Rowan (9 Peters, 317-18), one of the questions was whether one Allen Campbell, an alien, could take and hold land in the State of Kentucky, under an act of that State which extended the privilege to aliens who had resided in the State for two years. It was held that he could, and the Court, speaking through Mr. Justice Thompson, said:

> "That preamble evidently shows that the intention
> "of the legislature was to make a general provision
> "for removing the disability of aliens to hold real
> "estate, and this, founded upon State policy, doubt-

"less for the purpose of encouraging the settlement "of the country. * * * *No constitutional objection* "*can be made to this act.* It does not profess to natur- "alize aliens. It is not necessary that they should "be made citizens in order to hold and pass real es- "tate; and the condition upon which this may be "done, *is a matter resting entirely with the State legisla-* "*ture.*"

In Mager *vs.* Grima (8 How., 490) the Court sustained a law of Louisiana imposing a tax on legacies to aliens, which did not apply to legacies to citizens or to aliens domiciled in the State. And Chief Justice Taney, delivering the opinion, said:

"Now, the law in question is nothing more than "an exercise of the power which every State and "sovereignty possesses, of regulating the manner "and term upon which property, real or personal, "within its dominion may be transmitted by last will "and testament, or by inheritance; and of prescrib- "ing who shall and who shall not be capable of tak- "ing it. *Every State or nation may unquestionably re-* "*fuse to allow an alien to take either real or personal* "*property situated within its limits, either as heir or* "*legatee*, and may, if it thinks proper, direct that "property so descending or bequeathed shall belong "to the State. In many of the States of this Union "at this day real property devised to an alien is liable "to escheat. And if a State may deny the privilege "altogether, it follows that when it grants it, it may "annex to the grant any conditions which it sup- "poses to be required by its interests or policy."

The doctrine of the preceding case was approved and applied in Prevost *vs.* Greneaux (19 How., 7), and in Frederickson *vs.* Louisiana (23 How., 447).

In Airhart *vs.* Massieu (98 U. S., 491), the Court recognized and applied the principle that the property rights of aliens were controlled by the State law.

In Hauenstein *vs.* Lynham (100 U. S., 483), the right of the alien to inherit was sustained under the treaty with Switzerland. But the Court recognized the principle that in the absence of a treaty the State statutes would control, and speaking through Mr. Justice Swayne, said:

> "The law of nations recognizes the liberty of every "government to give to foreigners only such rights, "touching immovable property within its territory, "as it may see fit to concede. (Vattel, book 2, c. 8, "Sect. 114.) *In our country this authority is primarily "in the States where the property is situated*" (p. 484).

In Griffith *vs.* Cody, 113 U. S., 96, the principle was applied to the Constitution of California in force at the period then under consideration.

In Hanrick *vs.* Patrick (119 U. S., 156), the principle that in the absence of a treaty the property rights of aliens depends upon the State laws was applied to Texas titles in an elaborate opinion by Mr. Justice Mathews.

The question, therefore, has been repeatedly decided by this Court against the appellants' view, and it would seem that if any question can be considered settled this ought to be so.

The doctrine is only a branch of a wider principle, which was stated by Mr Justice Shiras in a recent case as follows:

"It is a principle firmly established that to the law "of the State in which the land is situated, we must "look for the rules which govern its descent, aliena- "tion and transfer, and for the effect and construc- "tion of wills and other conveyances."

De Vaughn *vs.* Hutchinson, 165 U. S., 570.

And such has always been the doctrine of the Court.

U. S. *vs.* Crosby, 7 Cranch, 115.

Clark *vs.* Graham, 6 Wheat., 577.

Kerr *vs.* Moon, 9 Wheat., 570.

McCormick *vs.* Sullivant, 10 Wheat., 202.

McGoon *vs.* Scales, 9 Wall., 23.

U. S. *vs.* Fox, 94 U. S., 320.

Brine *vs.* Insurance Co., 96 U. S., 627.

Robertson *vs.* Pickrell, 109 U. S., 610.

Ridings *vs.* Johnson, 128 U. S., 224.

Cope *vs.* Cope, 137 U. S., 682.

Lynch *vs.* Murphy, 161 U. S., 247.

Magoun *vs.* Ill. Trust Co., 170 U. S., 289.

From every point of view, therefore, the position that the provisions permitting aliens to inherit were beyond the power of the State to enact is destitute of every semblance of merit.

c. If the Code provisions permitting aliens to inherit, and in relation to the institution of heirship, were an invasion of the treaty making power, or even a violation of an actual treaty, the judgments of the State Courts would not be void or subject to attack in any way except on appeal or writ of error. It is

plain that, so far at least as the State can confer it, her Courts had complete jurisdiction of the proceedings, which resulted in final decrees in favor of the appellee. We have already stated the position in this regard, but we will briefly run over the matter again.

The Superior Courts are Courts of general jurisdiction, having full power over all "matters of probate" (pp. 27-8). Indeed, if we leave out the Court for the trial of impeachments (the Senate), and Justices of the Peace, who have jurisdiction only of money demands under $300, the Superior Courts are the only Courts of original jurisdiction in the State. In them is lodged, in the first instance, all the judicial authority of the State, whether at law or in equity or of statutory creation. There is no other class of State Courts which could possibly have jurisdiction of proceedings like those stated in the bill. The Constitution expressly gives them jurisdiction "of all matters of "probate," (p. 27), and that they "shall be Courts of "record." (Sec. 12, Art. VI.) When sitting in probate they have all the powers, both at law and in equity, which are necessary to the exercise of their probate functions (See p. 28); and the most complete and ample machinery for the investigation of such matters is provided by statute, including at least three formal methods of trying and determining the question of heirship (each of which was resorted to in this case), with appeals to the Supreme Court in each proceeding (pp. 35-46).

With the exception of a few small counties, which are

lumped together, there is one Superior Court for each county or city and county. The Superior Court of the City and County of San Francisco was, under the statute (quoted on p. 27 hereof), the only Superior Court of the State which could take jurisdiction of the estate of Thomas H. Blythe, because the bills aver that at the time of his death he was a resident of said city and county and left estate therein. (Tr., pp. 6-7 and p. 29.)

All the proceedings necessary to give the Superior Court of San Francisco jurisdiction of this particular estate, and of the three proceedings which resulted in the decrees in favor of the appellee, were taken. This appears to be so, not only because nothing is averred to the contrary, and therefore the presumption in favor of the action of Courts of general jurisdiction and the presumption against the pleader apply, but also because the bills aver that the appellants appeared in each proceeding and joined issue thereon. (See pp. 9, 14 and 16 hereof.) No attempt was made to remove any of said proceedings to the federal Courts, but they were allowed to pass to judgment in said Superior Court, and thereupon appeals were taken to the State Supreme Court, where the several decrees were affirmed. The appellants thereupon took a writ of error from this Court; but such writ was dismissed for want of jurisdiction. (Blythe *vs.* Ayres, 167 U. S., 746.)

The ultimate question decided by the State Courts was the right of the appellee to the property in suit as the heir of Thomas H. Blythe. The specific question on which

said ultimate question turned was whether the non-resident alienage of the appellee took away her capacity to inherit. This is not only apparent from the general frame of the bills, but is specifically stated. For the third amended and supplemental bill explicitly states that "your orators say that they do not controvert defendant's "title to said real property *if she can and did take the same* "*by inheritance* under the laws and facts set forth in this "bill." (Tr., p. 37.) Now, this question was necessarily involved in the decrees of the Superior Court. For it cannot be disputed that the appellee's capacity to inherit *was necessarily involved in the decrees that she did inherit.* Being necessarily involved, it would not matter whether the facts were actually litigated or not. In the subsequent suit in the Federal Court to quiet title to the property the probate decrees were conclusive of everything *which might have been litigated.*

Cromwell *vs.* County of Sac., 94 U. S., 352.
Stout *vs.* Lye, 103 U. S., 66.
Life Ins. Co. *vs.* Bangs, 103 U. S., 782.
Dimick *vs.* Revere Co., 117 U. S., 565-6.
Wilson *vs.* Deen, 121 U. S., 532-3.
Dowell *vs.* Applegate, 152 U. S., 327.
Morenhout *vs.* Higuerra, 32 Cal., 296.
Sullivan *vs.* Triunfo Co., 39 Cal., 459.
Byers *vs.* Neal, 43 Cal., 216.
Brummagim *vs.* Ambrose, 48 Cal., 368.
Parnell *vs.* Hahn, 61 Cal., 131.

In addition to this, the bills show that the question was actually litigated, the question of the appellee's non-resident alienage being "made plainly to appear." (Tr., pp. 9, 10, 11, 31, 32 and 35.)

The bills make no charge of fraud, concealment, unfairness or wrong of any kind in any of the proceedings before any of the State Courts. There is not even any suggestion of any want of information on their part. On the contrary, as just stated, it is expressly averred that the fact of non-resident alienage, on which appellants rest their case here, was "made plainly to appear" to the State Courts. The theory is that all the State decrees and decisions are absolute nullities, and subject to collateral attack. This theory is sought to be supported by general conclusions and epithets (which hardly amount to more than making faces at the decrees), and by the averment of the fact which it is said was "made plainly to appear" to the State Courts, viz., the non-resident alienage of the appellee at the time of descent cast.

The argument based upon this fact is that the State statutes permitting aliens to inherit or to be constituted heirs to lands in California are an "invasion of the treaty "making power," and therefore void, and that being void, the State Courts had no power to render judgments upon them. It is manifest that this theory assumes that the State Courts have no power to administer federal laws or treaties, and that whenever they meet one they are stricken with a sort of judicial paralysis, and that any

action on their part is in that connection *coram non judice*. We say that this is necessarily assumed, because if the State Courts *have* the power to pass upon such questions their action, however erroneous, would not be without jurisdiction.

It is probably a waste of time to refute such a proposition. Nevertheless we proceed to show how entirely destitute of foundation it is. The power of the State Courts to pass upon federal questions, where litigants do not exercise their right of removal to the federal Courts, is assumed by the provisions as to the revisory power of this Court over the decisisons of the State Supreme Court. For if their decisions be *in favor* of the federal right which is set up and claimed, this Court has no revisory power. Now it cannot be that the State Courts have power to pass upon federal questions one way but not the other. "If "it is judicial to hear and determine one way, it is like-"wise judicial to hear and determine the other." (Forsythe *vs.* Hammond, 166 U. S., 517). The theory of removal proceedings assumes the same concurrent power in the State Courts. For if the proceedings before them were *coram non judice*, there would be nothing to remove. The act of Congress expressly recognizes the concurrent jurisdiction of the State Courts, its provision being—

> "That the Circuit Courts of the United States shall "have original cognizance, *concurrent with the Courts* "*of the several States*, of all suits of a civil nature, at "common law or in equity, where the matter in dis-

"pute exceeds, exclusive of interest and costs, the "sum or value of two thousand dollars, and arising "*under the Constitution or laws of the United States, or* "*treaties made or which shall be made* under their au- "thority," etc.

Supp. to R. S., p. 611.

And this Court has said:—

"It must always be borne in mind that the Constitu- "tion, laws and treaties of the United States *are as* "*much a part of the laws of every State as its own local* "*laws and Constitution.* This is a fundamental prin- "ciple in our system of complex national policy."

Hauenstein *vs.* Lynham, 100 U. S., 490.

But if the State Courts have concurrent power to pass upon federal questions, how can their decisions upon such questions be said to be *coram non judice?* Why are they stricken with paralysis when a federal question presents itself? How can parties to proceedings in the State Courts, who have made no efforts for removal to the federal tribunals, but who have appeared before the State Courts and taken their chances of the litigation there, and after being defeated, have taken appeals to the State Supreme Court, and been defeated there, and have thereupon sued out a writ of error from this Court, and had it adjudged that this Court had no jurisdiction over the matter, calmly continue to litigate the very same questions in the Circuit Court?

Mays *vs.* Fritton, 20 Wall., 414.
Scott *vs.* Kelly, 22 Wall., 59.

The proposition that the State Courts have concurrent jurisdiction with the federal Courts to hear and determine federal questions, in the absence of proceedings for removal to the federal Courts, seems to meet and destroy the position taken in the bills of the appellants. But in pursuance of our duty to fully present the law bearing upon the case, we proceed to examine the decisions of this Court in cases in which jurisdiction of matters of probate has been entertained.

The first class of decisions consists of cases where, *pending administration*, litigation upon some specific matter connected with the estate which has not yet been passed upon by the probate Court, has been entertained by the federal court where the requisite conditions of citizenship exist.

Thus, a mortgage given by a deceased debtor in his lifetime may be foreclosed in a federal Court, if the holder of the mortgage be a citizen of another State, although the estate is then in process of administration in the probate Court. (Erwin *vs.* Lowry, 7 How., 172.)

So when the probate law (which was practically an insolvent law) provided that after the insolvency of the estate had been declared by the probate Court, no action should be maintained against the executor or administrator, but the assets should be distributed by the probate Court among the creditors, it was held that such law did

not, and could not, apply to a debt created out of the State, in favor of a citizen of another State, and that therefore an action could be maintained on such debt, in the federal Court, although administration was pending in the probate Court. (Suydam *vs.* Broadnax, 14 Peters, 67.)

So an heir, who had obtained a judgment against the administrator of his ancestor's estate, for failure to account for assets which came to his hands, may maintain in the federal Court, a bill against the administrator of the surety of the first mentioned administrator, for discovery, and for the application of the assets of the estate of the surety, to the payment of said judgment, although administration of the estate of the surety is pending. (Green *vs.* Creighton, 23 How., 90.)

So an heir, who is the citizen of another State, may maintain in the federal Court, a bill against the administrator who "had not yet made his final settlement," to obtain an accounting and a decree for the complainants' share of the estate. (Payne *vs.* Hook, 7 Wall., 426.)

So a bill by a widow may be maintained in the federal Court to enforce a trust as to property received from her by her husband in his life-time, though administration on the husband's estate be still pending—it not appearing that the question had been brought before either of said probate Courts. (Walker *vs.* Walker, 113 U. S., 73.)

So a federal Court has jurisdiction of an action against an administrator, upon a claim against the estate, if the

requisite conditions of citizenship exist, though administration in the probate Court be pending; and such a case, if commenced in a State Court, may be removed to the federal Court, under the local prejudice act. (Hess *vs.* Reynolds, 113 U. S., 73.)

So a citizen of New York, who is a judgment creditor of a decedent may maintain in the U. S. Circuit Court for Minnesota, a bill against an executor who has taken out letters testamentary in Minnesota, and who has in that State assets of the deceased, to have such assets applied to the satisfaction of the judgment, although the Minnesota administration remains unclosed, and although the assets were transmitted to Minnesota from an ancillary administration in California, which had been closed, the said assets being transmitted as the amount of a legacy left by the testator to the Minnesota executor. (Borer *vs.* Chapman, 119 U. S., 587.)

So when the principal administration was in Pennsylvania, and an ancillary administration was taken out in New Jersey, as to property there, which property at first went into the hands of the New Jersey executor, and after his death passed into the hands of an administrator *de bonis non*, whose accounts had been settled by the Orphan's Court, but no decree of distribution made, it was held that the Pennsylvania executor could maintain a bill in the federal Court for New Jersey to have the assets applied to a trust specified in the will. [Mem.: The statute of New Jersey provided that an executor or administrator

appointed in another State could sue in New Jersey without taking out letters there.]

Hayes *vs.* Pratt, 147 U. S., 557.

So, if the requisite conditions of citizenship exist, an heir may maintain in the federal Court a bill against an administrator and persons claiming to be interested in the estate, to determine the right of the complainant to a share of the estate, notwithstanding the pendency of administration in the probate Court. (Byers *vs.* McAuley, 149 U. S., 608).*

The principle of all such cases is that such relief is a recognized part of equity jurisprudence, and that the equity jurisprudence of the federal Courts cannot be interfered with by State provisions, but is always open to those whose citizenship entitles them to come into the federal Courts in proper cases.

It is to be observed, however, that all such cases assume that the proceedings of which the federal Courts took jurisdiction *were separate and independent proceedings*, and not such as were involved in the administrative proceedings in the probate Court, *as far as they had progressed* at the time of the commencement of the proceed-

*Note. Even in the cases above referred to the decrees in the federal Court merely *establish the right*, and leave the administration of it to the local court.

Yonley *vs.* Lavender, 21 Wall., 276.

Williams *vs.* Benedict, 8 How., 107.

But the judgment of a U. S. Circuit Court need not be presented as a claim against the estate, notwithstanding that the State statutes require judgments to be so presented.

Lawrence *vs.* Nelson, 143 U. S., 215.

ings in the federal Court. If a probate administration is to be regarded as *one connected proceeding*, necessarily involving all such suits as those entertained in the federal Court, the Court in which the proceeding was first commenced would have exclusive jurisdiction over it, the property of the estate being regarded as *in gremio legis*.

Byers *vs.* McAuley, 149 U. S., 615.
Re Chetwood, 165 U. S., 460.
Rio Grande R. R. *vs.* Gomila, 132 U. S., 478.
Tua *vs.* Carriere, 117 U. S., 208.
Heidritter *vs.* Elizabeth Co., 112 U. S., 304.

But if litigation like that in the cases above cited is to be regarded as independent and separate from the purely administrative proceedings, the federal Courts may under proper conditions of citizenship entertain them before they are commenced in the probate Court, or if so commenced, they may be removed to the federal Court by taking the required steps in due time. For example, a bill to determine the heirship of the various claimants to the estate of Thomas H. Blythe might have been commenced by the appellants in the federal Court for California, or, after it had been commenced by the appellee in the Superior Court, it might have been removed by the appellants to such federal Court by taking the course provided by the Act of Congress. And so of the proceedings for distribution.

The distinction between this class of cases and the case

at bar is that the appellants did *not* commence any proceeding in the federal Court, and did not make any attempt to have any proceeding in the Superior Court removed to the federal Court, but went into the State Court and took their chances of the litigation there, and on being defeated there, appealed to the State Supreme Court, and on being defeated there, took out a writ of error from this Court, which writ was dismissed for want of jurisdiction. (See Blythe *vs.* Ayres, 167 U. S., 746.) That is a very different case from those above cited.

The other classes of decisions to be noticed consists of cases where the federal Courts have entertained bills in equity after the local probate Courts have passed upon the matter. The distinguishing feature of this class of cases is *that the local law provided for such suits.* The federal Courts, in such cases, simply administer the local law, where the requisite conditions of citizenship exist. It is no doubt true that the local law cannot take away equitable remedies in the federal Courts. But, on the other hand, it is equally true that if the local law provides a remedy, that remedy can be resorted to in the federal Courts by a citizen of another State, upon the general proposition that "whenever a citizen of a State can go "into the Courts of a State to defend his property, * * "* a citizen of another State may invoke the jurisdiction "of the federal Courts to maintain a like defense." (154 U. S., 391.)

The Gaines cases will naturally suggest themselves in this connection. It will be remembered that the Louisiana Courts first admitted to probate a bogus will of Daniel Clark. Nevertheless, numerous suits were subsequently maintained in the federal Courts to try title to the property left by him. About half a century later Clark's real will (the will of 1813) was admitted to probate by the local Courts; but still the federal Courts entertained suits to try the title. This was because the probate of a will in that State was not conclusive as to real property. There were two kinds of action in which the validity of a will which had been admitted to probate could be drawn in question, so far as real property was concerned, viz., an action of revendication and an action of nullity. The precise distinction between these actions is not familiar to us; but in one way or another validity of the will could be subsequently drawn in question in the local Courts so far as real property was concerned. In this regard, in Gaines *vs.* Chew, this Court, speaking by Mr. Justice McLean, saying:

> "This remedy under the Louisiana law, and before "the Louisiana Courts, of ordinary jurisdiction, *would* "*be undoubted.* For, although those Courts cannot "annul the probate of a will, when presented col- "laterally, as a muniment of title, they inquire into "its validity."
>
> Gaines *vs.* Chew, 2 How., 650.

The same doctrine was laid down in Gaines *vs.* Hennen (24 How., 558). So, in Gaines *vs.* Fuentes, the ground of the decision was that the proceeding was authorized by the State law. And in this regard, Mr. Justice Field, delivering the opinion, after recognizing the authority of the decisions laying down the general rule that a decree admitting a will to probate could not be attacked in a subsequent proceeding, said:

> "But that such jurisdiction may be vested in the "State Courts by statute is there recognized, and "that *when so vested*, the federal Courts sitting in the "States where such statutes exist, will also entertain "jurisdiction in a case between proper parties."
>
> Gaines *vs.* Fuentes, 92 U. S., 21.

The same doctrine was acted on in Ellis *vs.* Davis. The Court, speaking by Mr. Justice Mathews, recognized the general rule that a court of equity would treat a decree admitting a will to probate as conclusive, saying, in this regard:

> "It is well settled that no such jurisdiction belongs "to the Circuit Courts of the United States, as courts "of equity; for courts of equity as such, by virtue of "their general authority to enforce equitable rights "and remedies, do not administer relief in such "cases." (p. 494.)

But the Court said that by the law of Louisiana the validity of the will could, in proper cases, be subsequently drawn in question in actions relating to real property (p. 499 et seq.), and went on to say:

"In those States where the probate, although con-
"clusive while in force as to personality and for the
"purposes of administration merely, is only *prima*
"*facie* evidence where the will is relied on as a muni-
"ment of title, its validity may become a question to
"be tried whenever and wherever a litigation arises
"concerning real property, the title to which is
"affected by it, just as in England, in actions of eject-
"ment between the heir and the devisee, or those
"claiming through them. In a State, of which New
"York is an example, where, *by its law, its own Courts*
"*of general civil jurisdiction are authorized* thus inci-
"dentally and collaterally to try and determine the
"question of the validity of a will and its probate
"in a suit involving the title to real property, there
"can be no question but that the Circuit Courts of
"the United States might have jurisdiction of such
"a suit, by reason of the citizenship of the parties,
"and in exercising it would be authorized and re-
"quired to determine, *as a Court administering the laws*
"*of that State*, the same questions." (p. 496.)

Ellis *vs.* Davis, 109 U. S., 485.

Where, however, the local law does *not* so provide, it is manifest that the decree of the probate Court cannot be disregarded, or impeached collaterally.

Herron *vs.* Dater, 120 U. S., 477-8.

Nor can it even be attacked on a bill in equity in the federal Courts by a citizen of another State.

This was first ruled in Tarver *vs.* Tarver. In that case the bill was brought by citizens of Georgia in the U. S. District Court for Alabama to set aside a will which had been admitted to probate, and for a distribution to the

heirs at law. It was held that this could not be done. And Mr. Justice Thompson, delivering the opinion, said:

> "And the bill cannot be sustained on the allegation "that the probate is void. An original bill will not "lie for this purpose. If any error was committed in "admitting the will to probate, it should have been "corrected by appeal. This is provided for by the "law of Alabama, which makes the County Court in "each county an Orphan's Court for taking the pro- "bate of wills, etc., and declares that if any person "shall be aggrieved by a definitive sentence, or judg- "ment, or final decree of the said Orphan's Court, he "may appeal therefrom to the next term of the Su- "preme Court in chancery, or in the District of Wash- "ington, to the Superior Court of that District. The "law also provides, that any person interested in "such will, may, within five years from the time of "the first probate thereof, file a bill in chancery to "contest the validity of the same; and the Court of "Chancery may thereupon direct an issue or issues in "fact, to be tried by a jury as in other cases. But "that after the expiration of five years, the original "probate of any will shall be conclusive and binding "upon all parties concerned; with the usual savings "to infants, femes covert, etc. (Toulmin's Dig., 887.) "We think that nothing has been shown to impeach "or invalidate this will, and that the bill cannot be "sustained for the purpose of avoiding the probate."

Tarver *vs.* Tarver, 9 Peters, 179-80.

This case was approved and followed in a case where the will had been admitted to probate under the Spanish laws, before Louisiana became a State.

Fouvergne *vs.* Orleans, 18 How., 470.

The same doctrine was laid down in the noted Broderick Will case, which came up from California, and related to its probate system. The Court upheld a forged will, whose admission to probate had been secured through perjured testimony, and speaking through Mr. Justice Bradley, after stating the rule, said:

> "Whatever may have been the original ground of "this rule (perhaps something in the peculiar con- "stitution of the English Courts) the most satisfac- "tory ground for its continued prevalence is, that the "constitution of a succession to a deceased person's "estate partakes, in some degree, of the nature of a "proceeding *in rem*, in which all persons in the world "who have any interest are deemed parties, and are "concluded as upon *res judicata* by the decision of the "Court having jurisdiction. *The public interest re-* "*quires that the estates of deceased persons, being deprived* "*of a master and subject to all manner of claims, should* "*at once devolve to a new and competent ownership;* and, "consequently, that there should be some convenient "jurisdiction and mode of proceeding may be ef- "fected with least chance of injustice and fraud; and "that the result attained should be firm and perpet- "ual."
>
> Case of Broderick's Will, 21 Wall., 509.

[Mem.: The complainants' in this case, who claimed to be heirs of Senator Broderick, were aliens, and hence the probate proceedings dealt with the rights of aliens.]

It will be observed of this case that the reason which it gives, viz., the interest of the public that titles should be settled, applies equally to succession through heirship as

to succession through a will, and Mr. Justice Bradley expressly uses the term "succession to a deceased person's "estate." And the doctrine and authority of the case were subsequently applied to the protection of the rights of purchasers claiming under an administration sale against the claims of heirs, who brought a bill in equity in the federal Court, no remedy provided by the local laws being applicable. This Court, after a careful examination of the laws of Louisiana, held that the doctrine of the case of Broderick's Will was controlling.

Simmons *vs.* Saul, 138 U. S., 439.

And see, also:

Robinson *vs.* Fair, 128 U. S., 153.
Caujolle *vs.* Ferrie, 13 Wall., 470.
Nougue *vs.* Clapp, 101 U. S., 554.
Scott *vs.* Kelly, 22 Wall., 57.
Parrish *vs.* Ferris, 2 Black, 606.
Bryan *vs.* Kennett, 113 U. S., 179.
Barrow *vs.* Hunton, 99 U. S., 80.
Jeter *vs.* Hewitt, 22 How., 371.
Miles *vs.* Caldwell, 2 Wall., 35.
Ingraham *vs.* Dawson, 20 How., 486.
Stockton *vs.* Ford, 18 How., 418.
C. & A. Rd. Co. *vs.* Wiggins, 108 U. S., 22.
Adams *vs.* Preston, 22 How., 488.
Randall *vs.* Howard, 2 Black, 589.

Now the law of California does not provide for again drawing in question the validity of probate decrees. On the contrary, as will appear from the statement of the case (pp. 35-8), the section providing for the formal proceedings to determine heirship expressly says that "the "final determination of the Court thereupon *shall be final* "*and conclusive* in the distribution of said estate, *and in* "*regard to the title to all the property of the estate of said d* "*eceased.*" (C. C. P., Sec. 1664.)

And the section in relation to decrees or orders of distribution provides that "such order or decree *is conclu-* "*sive* as to the rights of heirs, legatees, or devisees, sub- "ject only to be reversed, set aside, or modified on ap- "peal." (C. C. P., Sec. 1666, quoted on p. 45 hereof.)

Not only are there the foregoing provisions as to the particular proceedings under consideration here, but there is a general section which provides that—

> Sec. 1908. "The effect of a judgment or final order "in an action or special proceeding before a Court or "Judge of this State, or of the United States, having "jurisdiction to pronounce the judgment or order, "is as follows:
>
> "1. In case of a judgment or order against a spe- "cific thing, or in respect to the probate of a will, *or* "*the administration of the estate of a decedent*, or in "respect to the personal, political or legal condition, "*or relation* of a particular person, *the judgment or* "*order is conclusive* upon the title to the thing, the will "*or administration* or the condition *or relation* of the "person." * * *

These provisions are so clear as not to need construction. Nevertheless authorities are not wanting as to the conclusive effect of probate decrees The settled rule is that such decrees cannot be attacked either collaterally or by bill in equity.

The William Hill Co. *vs.* Lawler, 116 Cal., 359.
Crew *vs.* Pratt, 119 Cal., 139.
Goad *vs.* Montgomery, 119 Cal., 552.
Jewell *vs.* Pierce, 120 Cal., 79.
Langdon *vs.* Blackburn, 109 Cal., 19.
Daley *vs.* Pennie, 86 Cal., 552.
Re Griffith, 84 Cal., 107.
McClellan *vs.* Downey, 63 Cal., 520.
Freeman *vs.* Rahm, 58 Cal., 110.
Robinson *vs.* Fair, 128 U. S., 153.

As a matter of course, if the probate Court was without jurisdiction its decree would not be conclusive. Thus, if the decree was obtained by extrinsic fraud, "and with-" out notice to the party against whom it was rendered," it can be set aside (Baker *vs.* O'Riordan, 65 Cal., 368). So, if the notice required to be published was not published as required, the decree would be void (Pearson *vs.* Pearson, 46 Cal., 611). But these are very different cases.

There can be no pretense that the local law takes the case out of the rule established by the Broderick Will case and the other cases above cited.

II.

NO CONSTITUTIONAL QUESTION IS INVOLVED.

The rule with regard to federal questions, in general, which are relied upon to give jurisdiction to the Court below, is that they must appear from the plaintiffs' pleading.

Colorado Mg. Co. *vs.* Turck, 150 U. S., 143.
Tennessee *vs.* Union Bank, 152 U. S., 454.
Borgmeyer *vs.* Idler, 159 U. S., 408.
Press Publishing Co. *vs.* Monroe, 164 Fed., 110.
Muse *vs.* Arlington Hotel Co., 168 U. S., 436.

We should think that this rule would apply to the Constitutional questions which may be brought to this Court on appeal; for the case which this Court examines on appeal is the same case over which the lower Court had jurisdiction. But, however, this may be, this much at least is clear, viz.: that the constitutional question must arise somewhere *in the record*. The mere *assertion* that any particular federal question is involved goes for nothing.

Budzisz *vs.* Ill Steel Co., 170 U. S., 44.

Turning now to the appellants' bills, the only constitutional provision which is referred to, or with which any averment has the remotest connection, is Section X, of Article I, which provides that "no State shall enter into "any treaty, alliance, or confederation." We have shown

under Point I (what, indeed, is almost too clear for discussion) that the Sections of the California Code permitting aliens to inherit, and providing for the institution of heirship, do not constitute a treaty, and are not, in any view, an invasion of the treaty-making power. If this be so, the averment that the constitutional provision referred to is involved is merely frivolous and fictitious.

Wilson *vs.* North Carolina, 169 U. S., 595.

New Orleans *vs.* N. O. Water Works, 142 U. S., 87.

Hamblin *vs.* Western Land Co., 147 U. S., 532.

The constitutional question must be really and substantially involved.

New Orleans *vs.* Benjamin, 153 U. S., 424.

Even if the Code provisions referred to were in violation of a treaty that would not involve a constitutional question, for as already shown a treaty stands on the same footing as an Act of Congress.

Fong Yue Ting *vs.* U. S., 143 U. S., 571.

Chinese Exclusion Cases, 130 U. S., 600.

And if it be said that the Code deals with subjects which might be the subject of a treaty, the answer is that that does not make the question a constitutional one, any more than a State statute could be said to involve a constitutional question because it dealt with a subject which *might* be the subject of an Act of Congress. The constitu-

tional question must not be remotely or collaterally involved. *It must be controlling.*

Carey *vs.* Houston Ry., 150 U. S., 181.

An illustration of this is to be found in a recent case. The Constitution provides for the institution of federal Courts. Congress could not have established the lower federal Courts unless its action was authorized by the Constitution. But a question as to the jurisdiction of those Courts is not a constitutional question within the meaning of the Act of 1891.

Merritt *vs.* Bowdoin College, 169 U. S., 551.

Federal questions which are only collaterally involved do not give jurisdiction.

Leyson *vs.* Davis, 170 U. S., 36.

The assignments of error do not help the appellants. In the first place, a constitutional question cannot be imported into a case by means of assignments of error.

Ansbro *vs.* U. S., 159 U. S., 695.

Cornell *vs.* Green, 163 U. S., 80.

In the second place, the assignments of error do not refer to any constitutional provision except the one referred to in the bill, but merely state generally that the provisions of the Constitution were violated. This is insufficient.

Clarke *vs.* McDade, 165 U. S., 168.

Nor do the questions certified throw any light upon the question, for the observations just made apply to such questions.

We submit that it is perfectly plain that no constitutional question is involved.

III.

THE CIRCUIT COURT HAD NO JURISDICTION.

It is true that the requisite conditions of citizenship existed before the joinder and after the dismissal of the defendant Boswell M. Blythe; but it does not follow that the bills were improperly dismissed. In the first place, the question of jurisdiction arising from citizenship is not among the questions certified to this Court. Not a single one of the fifteen lengthy questions stated in the certificate says anything about the citizenship of the parties. In the second place, the object of the suit—the thing which the appellants sought to obtain from the Circuit Court—was a decision which should, either in terms or in effect, pronounce the decisions of the State Courts to be invalid and of no effect. Why else should the bills have so carefully set forth the decisions of the State Courts? If we are right in our position that the Circuit Court had no power to do any such thing, then we submit that it was without jurisdiction over the case. The case would be just the same in principle as if the appellants had filed their bill to remove the Governor of the State from his office. The

federal Courts have no jurisdiction to array themselves in hostility to the State government, either by depriving the officers of their offices or by setting aside or disregarding the valid judgments of the State Courts. The question of the validity of the judgments set forth in the amended and supplemental bills has been fully discussed, and it is not necessary to say anything further upon the subject.

The appellants will, doubtless, have a technical answer to this. They will say that the bills did not ask the Circuit Court to set aside or review the decisions of the State Courts, and that, if they are valid, it is for the defendant to set them up, and that the case should proceed until that shall be done. But the bills themselves show that the whole matter is concluded by valid judgments of the State Courts. Why should it be necessary for the defendants to have set forth something which is shown by the bills? We submit that there was no such necessity. The bills having set forth the State judgments showed on their face that no federal question was *really and substantially* involved.

Robinson *vs.* Anderson, 121 U. S., 524.

The following cases show that the objection goes to the jurisdiction.

Nougue *vs.* Clapp, 101 U. S., 554.
Randall *vs.* Howard, 2 Black, 589.
Barrow *vs.* Hunton, 99 U. S., 80.

Forsyth *vs.* Hammond, 166 U. S., 520.
Robinson *vs.* Fair, 128 U. S., 153.

It is not one of the cases where a citizen of another State can come into the federal Court for relief against fraud in obtaining a judgment in a State Court. For not only are decrees *in rem* of an exceptional character, but no fraud is charged.

It may be added, in conclusion of this point, that the matter was, in effect, passed upon by the Court when it dismissed the writ of error for want of jurisdiction. The record in the Superior Court must necessarily have been taken to the Supreme Court by the appeal, and brought to this Court by the writ of error. The very same record must be produced to the Circuit Court if it should proceed with this cause. This Court, upon that record, decided that it had no jurisdiction to review the State decision, thereby necessarily affirming that the decision against the appellants here either did not involve a federal question, or that some State ground existed which was sufficient to support the decision. If this Court had no jurisdiction, how had the Circuit Court jurisdiction? No new case is made. The bills simply go over the old ground. And, furthermore, the briefs on file on the motion to dismiss the writ of error will show that the same ground of non-resident alienage was presented to this Court, which is sought to be presented to it on this appeal.

Blythe *vs.* Ayres, 167 U. S., 746.

We do not say anything on the question as to whether the objections to the complainants' bills ought to have been taken in the Circuit Court by demurrer instead of by motion. Such question does not go to the power of the Circuit Court, and cannot be presented on certificate.

IV.

THE APPELLANTS' INTEREST IN THE CAUSE HAS CEASED BY REASON OF THEIR FAILURE TO ATTACK THE DECREE AGAINST THEM ON THE MERITS.

If we are right in the preceding contention that the question of the validity of the decrees of the State Court, and the power of the Circuit Court to override them, goes to the jurisdiction of the federal Court, then it is manifest that the decree appealed from here was right. If, however, such question does not go to the federal jurisdiction, it nevertheless does go to the equity jurisdiction, and the State decrees being manifestly right as to the merits, it is apparent that there was no equity jurisdiction. There was no equity jurisdiction for another reason, viz.: that since the appellee was in possession of the land, and the right to such possession *was challenged by the bills*, the defendant was entitled to a jury trial as a matter of right (Gillespie *vs.* Gouly, 120 Cal., 515). Here were two plain grounds of want of equity jurisdiction.

Now, the Circuit Court decreed against the appellants on the ground of want of equity jurisdiction. The decree appealed from expressly states that the bills were dismissed for want of either federal or *equity jurisdiction*" (Tr., p. 41). As we have said, there was ample ground for this decision. But whether that is so or not, this Court must assume that there was such ground, for it cannot enquire into the question on certificate.

Smith *vs.* McKay, 161 U. S., 365.
Black *vs.* Black, 163 U. S., 678.
Tucker *vs.* McKay, 164 U. S., 701.

Such being the case, the decree dismissing the bill for want of equity jurisdiction must stand. It would not be disturbed by a reversal of the only part of the decree over which this Court has power on certificate. On the contrary, *it would be made better;* for, in case of such reversal, it would be plain that the Circuit Court *did* have jurisdiction, but that there was no cause of action. Of what earthly use would it be therefore for this Court to say upon certificate that the Circuit Court *had* federal jurisdiction? The decision as to the want of equity, after it became conclusive by reason of the failure of the appellants to take the case to the Circuit Court of Appeals, destroyed all the appellants' interest in the matter.

The case is not like what it might have been under the old Act regulating appeals. For there, this Court on appeal had power over the whole cause. Nor is it like what

it would be if the Circuit Court had decreed in favor of its jurisdiction, and the defendants had brought the case here on certificate on this ground; for, in such case, a reversal would necessarily cut away the whole decree.

Nor does the assertion by the Circuit Court that it had no jurisdiction nullify the decision which it did make on the merits. Notwithstanding such assertion, the record shows that *it did, in fact, assume jurisdiction of the cause, and did, in fact, decide it on the ground of want of equity jurisdiction.* The appellants should have gone to the Circuit Court of Appeals.

V.

In conclusion, we are constrained by our sense of duty to our client to submit whether this entire litigation in the federal Courts is not so entirely groundless as to amount to an abuse of the process of the Court. If this Court shall be of opinion that it is, we respectfully ask for such an expression of its opinion upon the question of the non-resident alienage of the appellee at the time of descent cast, as will afford us relief from further litigation on this ground in the federal Courts. This question was really decided by the decision dismissing the writ of error, if we correctly apprehend the matter. But, unfortunately for us, the Court seemed to consider the question so plain as not to require an opinion (167 U. S., 746). The result has been that what seems to us a causeless, and which is

certainly an expensive litigation, has been inflicted on our client.

Respectfully submitted,

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